April 7th/11
1874

Affirmed
Judge Davis 19-619 Affd

Judge Field
Dissents

1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 282.

GEORGE MACKAY, PLAINTIFF IN ERROR,

VS.

ALTON R. EASTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 27, 1872.

Oct. 2 1874

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1 EASTERN DISTRICT OF MISSOURI, *sct:*

Pleas before the honorable the circuit court of the United States for the eastern district of Missouri, at the September term of said court, A. D. 1872.

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

Be it remembered that heretofore, to wit, on the seventh day of December, A. D. 1871, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri the following petition, to wit:

Petition.

UNITED STATES OF AMERICA,
State of Missouri, ss:

In the circuit of the United States for the districts of Missouri, April term, 1872.

GEORGE MACKAY, PLAINTIFF,
against
ALTON R. EASTON, DEFENDANT.

George Mackay, a citizen of the State of New York, plaintiff in this suit, complains of Alton R. Easton, a citizen of the State of Missouri, defendant in this suit, of a plea of trespass and ejectment. Said plaintiff avers and states, in this his petition and complaint, that heretofore, to wit, on the first day of July, in the year of our Lord eighteen hundred and seventy-one, at the districts of Missouri aforesaid, the plaintiff was legally entitled to the possession of a certain tract, piece, or parcel of land, situated, lying, and being in the county of St. Louis, in the State of Missouri, containing one hundred and sixty acres; being designated and known as the New Madrid location, made under New Madrid certificate numbered one hundred and fifty-nine, (159,) issued to J. Smith, by the recorder of land-titles of the United States of America, at St. Louis, Missouri, on the 16th day of November, 1815, and surveyed and known as United States survey (No. 2491) two thousand four hundred and ninety-one, in township 45, north of range 7 east, being the
2 same tract of land confirmed to the said J. Smith, or his legal representatives, by the act of Congress entitled "An act concerning certain locations of lands in the State of Missouri," approved June 30th, 1864, which said tract or piece of land is of the value of one hundred thousand dollars. And being so entitled to the possession thereof, the said defendant afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and seventy-one, entered into and upon the said land and premises above described, and unlawfully withholds from the plaintiff the possession thereof, to the damages of said plaintiff of ten thousand dollars, for which sum he asks judgment together with costs; also judgment for the recovery and rendition of the said tract or piece of land hereinbefore described; and therefore he brings suit.

JOHN F. DARBY,
Attorney for Plaintiff.

And afterwards, to wit, on the seventh day of December, A. D. 1871, there was issued out of the clerk's office of said circuit court the following summons, to wit:

Summons.

MISSOURI DISTRICTS, *sct:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Alton R. Easton, a citizen of the State of Missouri, that he be and appear before the honorable circuit court of the United States for the districts of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said districts, on the first Monday of April next, then and there to answer the complaint of George Mackay, a citizen of the State of New York, as set forth in the petition filed in said court on the seventh day of December, A. D. eighteen hundred and seventy one. Hereof fail not, and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the seventh day of December, A. D., eighteen hundred and seventy-one.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

3 Upon said summons, the marshal of the United States for the eastern district of Missouri made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the summons, together with a copy of the petition, to the within-named Alton R. Easton, at St. Louis, within the eastern district of Mo., March 4, 1872.

(Signed) C. A. NEWCOMB,
U. S. Marshal, E. D. Mo.
By C. F. NEWCOMB, *Deputy.*

And afterwards at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and holden at the city of St. Louis, in and for said districts, on the first Monday of April, A. D. 1872, the following proceedings were had in this case, on Tuesday the 2nd day of April, in said last-mentioned year, to wit:

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day comes the defendant, by attorneys, and files his answer herein. The answer filed as aforesaid is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the districts of Missouri, April term, 1872.

GEORGE MACKAY, PLAINTIFF,
vs.
ALTON R. EASTON, DEFENDANT.

The said defendant makes the following answer to the petition filed in this case:

1. The defendant denies that the plaintiff was, on the first day of July, 1872, or at any other time, legally entitled to the possession of the premises described in the petition, or any part thereof.

2. The defendant denies that the said premises were confirmed to J. Smith, or his representatives, by act of Congress of June 30, 1864, as alleged in the petition.

3. The defendant denies that he unlawfully withholds, or ever has unlawfully withheld, the possession of the said premises, or any part thereof, from the plaintiff; or that the plaintiff has ever suffered any damage thereby. The defendant, further answering, says that
4 the title, both legal and equitable, to said premises has been vested
in the defendant, and those under whom he claims, for more than forty years. The defendant denies that he was, on the first day of July, 1871, or at any time since, in the possession of any part of the premises described in the petition, except that part of the same hereinafter described. The defendant, further answering, avers that he and those under whom he claims are now and have always been, for fifty years next before the commencement of this action, in the actual, continuous, open, and notorious possession of the part of said premises below described, claiming the same in fee-simple, adversely to all the world, and he relies on such possession as a bar to the plaintiff's action. That portion of said premises so in the possession of the defendant, as aforesaid, is described as follows: Lots of ground situate in the city and county of St. Louis, State of Missouri, in a subdivision of United States survey No. 2491, called Easton's subdivision, a plat of which subdivision is duly recorded in the office of the recorder of deeds for said county.

First. A lot of ground in said subdivision containing a front on the east line of Compton avenue of 308 feet 6 inches, by a depth eastwardly with the same width of 157 feet 9 inches, and more particularly described thus: Begin at the northwest corner of block No. 35, of said subdivision, thence eastwardly along the north line of said block, 157 feet 9 inches, to the northeast corner of said block; thence southwardly and parallel with Compton avenue 308 feet 6 inches to a point; thence westwardly in a straight line 157 feet 9 inches, to Compton avenue; thence northwardly along the east line of Compton avenue to the place of beginning; bounded north by the north line of said block, east by the east line of said block, south by land of Charles Rehbein, and west by Compton avenue.

Second. A lot in same block, No. 35 of said Easton's subdivision, and described thus: Begin at a point in the east line of Compton avenue 383 feet feet 6 inches south of the northwest corner of said block No. 35; thence southwardly along Compton avenue 108 feet to a
5 point; thence eastwardly on a straight line 157 feet 9 inches, to
a point in the east line of said block No. 35; thence northwardly and parallel to Compton avenue 68 feet to a point; thence in a north-

westwardly direction and upon a line parallel with Franklin avenue 150 feet, to the place of beginning; bounded north by land of Theodore Barthold, east by the east line of said block No. 35, south by lands of Andrew Carroll et al., west by Compton avenue.

Third. Also another lot in said block No. 35, of said subdivision, described thus: Begin in the east line of said block No. 35, 491 feet 6 inches south of the north line of said block No. 35; thence along said east line of said block No. 35, 100 feet to a point; thence westwardly 21 feet to a point, being the southeast corner of an alley in said block No. 35; thence along the east line of said alley 100 feet to a point; thence eastwardly 21 feet to the place of beginning; bounded north by land of said defendant , east by the east line of said block No. 35, south by lands of Charles Wiggins and west by said alley. Also another lot of ground in block No. 32, of said Easton's subdivision, described thus: Begin at the northwest corner of said block No. 32, thence south along the east line of Compton avenue 379 feet 6 inches to a point 60 feet north of the southwest corner of said block; thence east and parallel with the south line of said block 157 feet 9 inches to a point; thence north along the east line of said block 245 feet; thence in a northwest direction along south line of Easton avenue 197 feet 11 inches, to place of beginning.

THOMPSON, with
GIBSON AND CASSELBERY,
Def'ts Att'ys.

And afterwards, at said last-mentioned term of said circut court, begun and holden as aforesaid, the following further proceedings were had in this case on Wednesday, the tenth day of April, in said last-mentioned year, to wit:

GEORGE MACKAY, PLAINTIFF,
vs.
A. R. EASTON, DEFENDANT.
} Petition.

6 *Reply filed.*

This day comes plaintiff, by attorneys, and by leave of court files his reply to the answer of defendant herein.

The reply filed as aforesaid is in the words and figures following, to wit:

Reply to answer of defendant.

In the circuit court of the United States for the district of Missouri, April term, 1872.

GEORGE MACKAY, PLAINTIFF,
vs.
ALTON R. EASTON, DEFENDANT.

And now comes the plaintiff, and for replication to the defendant's answer says he denies that either the legal or equitable title to said premises has been or is vested in defendant, or those under whom he claims, for forty years, or any number of years, or at all. Plaintiff further denies that the defendant and those under whom he claims have been for fifty or any number of years in the actual, continuous, open, and notorious possession of the part of the premises described in his answer, claiming the same in fee-simple, adversely to all the world; and he denies that defendant has acquired any rights under the statute of limitation or by adverse possession, and denies that any such possession is any bar to plaintiff's recovery.

J. F. DARBY,
Attorney for Plaintiff, with
D. T. JEWETT,
who is also for Pl'ff.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Saturday, the thirteenth day of April, in said last-mentioned year, to wit:

Order of continuance.

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day comes plaintiff, by attorneys, and on motion of said attorneys it is ordered that this case be now continued until the next term of this court.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Monday, the fifteenth day of April, in said last-mentioned year, to wit:

7 *Motion to set aside continuance filed; same overruled; parties to file abstracts and lodge title-papers.*

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day come the parties, by their attorneys, the plaintiff by Mess. Darby and Jewett, and the defendant by Messrs. Thompson, Gibson and Casselbery, and thereupon said defendant files a motion, in writing, to set aside the continuance entered herein at a former day of this term, also the affidavits of Evans, Casselbery, and Charles Gibson in support of said motion. And the court having considered said motion, and being fully advised in the premises, it is ordered that the same be overruled. And thereupon, on motion of defendant's attorneys, it is ordered that plaintiff file his abstracts of title, and lodge with the clerk his title-papers, on or before first June next, and that defendant file his abstracts and lodge his title-papers within ten days thereafter.

And afterwards, on the first day of June, A. D. 1872, it being in vacation of said circuit court, the following proceedings were had in this case, to wit:

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day comes the plaintiff, by his attorney, John F. Darby, esquire, and in accordance with the order of court entered herein files his abstracts of title in this case.

And afterwards, at an adjourned session of the April term of said circuit court, A. D. 1872, the following further proceedings were had in this case on Tuesday, the 11th day of June, in said year, to wit:

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

Continuance set aside.

This day come the parties, by their respective attorneys, the plaintiff by Messrs. Darby and Jewett, and the defendant by Messrs. Gibson, Thompson and Casselbery, and on motion of said attorneys it is ordered that the order of continuance hereinbefore entered be, and the same is hereby, set aside.

Consent of parties that abstracts of title filed in this case to be considered the abstracts of title in all cases pending wherein Mackay is plaintiff.

And thereupon, by consent of said attorneys, it is ordered that the abstracts of title filed by said plaintiff in this case be considered the abstracts of title of the plaintiffs in all of the cases now pending in this court wherein George Mackay is plaintiff, and the abstracts of title hereafter to be filed by the defendant herein are to be considered as the abstracts of title of the defendants in all of said cases.

Notice filed.

And thereupon said defendant, by his said attorneys, files a notice, directed to the plaintiff, setting forth that said defendant will, upon the trial of this case, except to the introduction in evidence on behalf of said plaintiff of a certain deed described in said notice.

Continuance.

It is further ordered that this case be, and the same is now hereby, continued until the next term of this court.

The notice filed as aforesaid is in the words and figures following, to wit:

Notice.

GEORGE MACKAY
vs. }
ALTON R. EASTON.

U. S. cir. c't for Missouri, June 11th, 1872.

The defendant's counsel now gives notice in open court to plaintiff's counsel, that they will except to the introduction of any copy of the alleged deed from J. Smith to Andrew P. Gillispie, because the absence of the original deed is not accounted for; and they will object to the giving in evidence of the original deed, because it is not lodged with the clerk, or made any part of the plaintiff's abstract, and because the original is within the control of the plaintiff.

C. GIBSON,
E. CASSELBERY,
W. B. THOMPSON, *P.D.*

And afterwards, on the 17th day of June, A. D. 1872, it being in vacation of said circuit court, the following proceedings were had in this case, to wit:

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

9 This day comes the defendant herein, by his attorneys, and files his abstract of title as required by the order of court.

And afterwards, on the 30th day of July, A. D. 1872, it being in vacation of said circuit court, the following proceedings were had in this case, to wit:

Leave granted to withdraw a certain bond on file.

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day comes the plaintiff, by his attorney, John F. Darby, esquire, and on motion of said attorney it is ordered by the honorable Samuel Treat, one of the judges of this court, that said plaintiff have leave to withdraw from the files in this case the original bond of I. Smith to Andrew P. Gillispie, dated the fourteenth day of April, 1816, and referred to in the abstract filed by the plaintiff herein, and the clerk is directed to make a certified copy of said bond, to be filed upon the withdrawal of the original, for which the clerk will take the receipt of the attorney for said plaintiff.

And afterwards, at the September term of the circuit court of the United States in and for the eastern district of Missouri, begun and holden at the city of S't Louis, in said district, on the third Monday of September, A. D. 1872, *A. D.* 1872, the following proceedings were had in this case on Tuesday the 24th day of September, in said year, to wit:

Case called for trial.—Jury sworn.—Heard in part.

GEORGE MACKAY, PLAINTIFF,
vs. } Petition.
ALTON R. EASTON, DEFENDANT.

This day come the parties, by their respective attorneys, the plaintiff by Mess. Darby and Jewett, and the defendant by Mess. Thompson, Gibson and Casselbery, and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come, and thereupon come said jury, to wit, John E. Stilwell, George L. Collier, William H. Cobb, Perry Nichols, A. J. Hines, Arthur Shuler, Louis Espenschied, John N. Conn, Wesley Waddell, George M. Edgerton, B. Turpin, and J. D. Tucker, twelve good and lawful men, who were sworn
10 well and truly to try the issues joined herein, and thereupon the hearing of said case was commenced; but the same not having been concluded at the hour of adjournment, it is ordered that further proceedings therein be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Wednesday, the 25th day of September, in said year, to wit:

Further hearing of case.

GEORGE MACKAY, PLAINTIFF, } Petition.
vs.
ALTON R. EASTON, DEFENDANT. }

This day come again the parties, by their respective attorneys, as on yesterday, and the jury sworn herein being also present, the hearing of this case was resumed, and the same was further heard, and not having been concluded at the hour of adjournment it is ordered that further proceedings therein be now continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Thursday, the 26th day of September, in said year, to wit:

Further hearing of case.

GEORGE MACKAY, PLAINTIFF, } Petition.
vs.
ALTON R. EASTON, DEFENDANT. }

This day come again the parties, by their respective attorneys, as on yesterday, and the jury sworn in this case being also present, the hearing of said case was resumed, and the same was further heard, but not having been concluded at the hour of adjournment it is ordered that further proceedings therein be continued until to-morrow morning.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Friday, the 27th day of September, in said last-mentioned year, to wit:

11 *Case further heard and submitted to jury.*

GEORGE MACKAY, PLAINTIFF, } Petition.
vs.
ALTON R. EASTON, DEFENDANT. }

This day come again the parties, by their respective attorneys, as on yesterday, and the jury sworn herein being also present, the hearing of this case was resumed, and the same was further heard and submitted to said jury, who, after having received the instructions of the court as to the law of the case, returned the following verdict, to wit:

Verdict.

We, the jury in the above-entitled cause, find a verdict for the defendant.

GEORGE M. EDGERTON, *Foreman.*

Judgment.

It is, therefore, now considered by the court that said plaintiff, George Mackay, take nothing by his writ herein, and that said defendant, Alton R. Easton, go hence without day, and recover against said plaintiff the costs in this behalf expended, and that execution be issued therefor.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Monday, the 14th day of October, in said year, to wit:

Bill of exceptions filed.

George Mackay, plaintiff,
vs. } Petition.
Alton R. Easton, defendant.

This day comes the plaintiff, by his attorney, and presents to the court his bill of exceptions herein, which having been signed and sealed by the honorable Samuel F. Miller, presiding judge of this court, it is ordered that the same be filed and made a part of the record in this case.

And afterwards, at said last-mentioned term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in this case on Saturday, the 19th day of October, in said year, to wit:

George Mackay, plaintiff,
vs. } Petition.
Alton R. Easton, defendant.

12 *Writ of error allowed.—Bond filed and approved.*

This day comes the plaintiff, by his attorney, John F. Darby, esquire, and presents to the court a writ of error herein, which said writ of error is allowed; and said plaintiff also presents his bond as required by law, which is approved by the court, and ordered to be filed and made a part of the record herein.

The bond filed as aforesaid is in the words and figures following, to wit:

Bond.

Know all men by these presents that I, Harry Lander, of the city and county of St. Louis, and State of Missouri, am held and firmly bound unto Alton R. Easton in the full and just sum of five hundred dollars, to be paid to the said Alton R. Easton, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators by these presents, sealed with our seals, and dated this nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately, at the September term, A. D. 1872, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between George Mackay, plaintiff, and Alton R. Easton, defendant, judgment was rendered against the said George Mackay; and the said George Mackay having obtained a writ of error of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Alton R. Easton, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next.

Now the condition of the above obligation is such that if the said George Mackay shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HARRY LANDER. [SEAL.]

Sealed and delivered in presence of—

Approved by—
(Signed) SAMUEL TREAT, *Judge.*

13 The bill of exceptions referred to in the foregoing order, of date the fourteenth of October, 1872, and copied on page 11 of this transcript, is in the words and figures following, to wit:

Bill of exceptions.

In the United States circuit court for the eastern district of Missouri, September term, 1872.

GEORGE MACKAY, PLAINTIFF, *vs.* ALTON R. EASTON, DEFENDANT. } Ejectment.

Be it remembered that on the trial of this cause the plaintiff gave the following evidence:

1st. Act of Congress, approved 30 June, 1864, chapter 156, entitled "An act concerning certain locations of land in the State of Missouri."

Act of Congress 30th June, 1864.

(Statutes at Large, vol. 15, page 581-'2.)

The act of Congress referred to as aforesaid is in the words and figures following:

Chap. CLXXXVI.—An act concerning certain locations of lands in the State of Missouri, June 30, 1864.

The interest of the United States in certain lands in Missouri, granted to.

1815. Ch. 45, Vol. 3, p. 211.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the right, title, and interest of the United States in and to all of the lands within the respective boundaries of the following described locations in township forty-five, north of the base line, in range seven east of the fifth principal meridian line, in the State of Missouri, made by virtue of certificates issued under the act of Congress approved February the seventeenth, eighteen hundred and fifteen, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," shall be, and the same are hereby, granted, relinquished, and conveyed by the United States, in fee-simple and in full property, to the following-mentioned persons, respectively, or their respective legal representatives, in whose names said locations were severally made, to wit: Location under certificate number one hundred and sixty-one, being survey number two thousand five

hundred, in the name of Joseph Hunot, or his legal representatives; location under certificate number three hundred and forty-eight, being survey number two thousand seven hundred and twelve, in the name of James Conway,
or his representatives; location under certificate
14 number one hundred and fifty-nine, being survey
number two thousand four hundred and ninety-one, in the name of J. Smith, or his legal representatives; location under certificate number one hundred and forty-five, being survey number two thousand four hundred and ninety-nine, in the name of Martin Coontz, or his legal representatives; location under certificate number nineteen, being survey number two thousand six hundred and ninety-two, in the name of Joseph Genereux, or his representatives; location under certificate number sixteen, being survey number two thousand and six hundred and twenty, in the name of Francis Delisle, or his legal representatives; and location under certificate number one hundred and sixty-four, being survey number two thousand five hundred and forty-one, in the name of John Brooks, or his legal representatives: Provided, however, that nothing contained in the foregoing provisions of this act shall, directly or indirectly, comprehend, include, extend to, grant, relinquish, or convey the whole or any part of any lot, tract, piece or parcel of land in said township which has heretofore been confirmed and surveyed by the United States to any person or persons, or to the legal representatives of any person or persons: And provided further, that nothing in this act shall in any manner abridge, divest, impair, injure, or prejudice any adverse right, title, or interest of any person or persons in or to any portion or part of the aforesaid lots, tracts, pieces or parcels of land which are granted, relinquished, or conveyed by this act.

Joseph Hunot.

James Conway

J. Smith.

Martin Coontz.

Joseph Genereux.

Francis Delisle.

John Brooks, nothing heretofore conveyed, granted hereby.

Rights of third parties not affected hereby.

Approved June 30, 1864.

2nd. A platt of the town of Little Prairie, New Ma'rid County, showing the position of lots nine and ten in block three that originally belonged to J. Smith.

(Here follows map marked page 14.)

15 3rd. Confirmation by the board of commissioners of lots nine and ten to J. Smith, in the town of Little Pra'rie, dated 9 July, 1811.

Confirmation by Louisiana, commissioners' certificate No. 1116, July 9th, 1811.

We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided that J. Smith, original claimant, is entitled to a patent under the provisions of the 2nd section of an act of the Congress of the United States entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," passed the second day of March, one thousand eight hundred and five, for two arpens of land situate in the district of New Madrid, village of Little

Board of commissioners' certificate 1116, date July 9, 1811.

Prairie, and order that the same be surveyed on his possession, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the twentieth day of December, one thousand eight hundred and three.

(Signed) JOHN B. C. LUCAS.
(Signed) CLEMENT B. PENROSE.
(Signed) FREDERICK BATES.

4th. Certificate of Recorder Bates for New Madrid certificate of relocation No. 159, dated St. Louis, November 16, 1815, to J. Smith, for one hundred and sixty acres of land.

No. 159. J. Smith. 160 acres.

OFFICE OF THE RECORDER OF LAND-TITLES,
St. Louis, Nov. 16, 1815.

New Madrid certificate, No. 159, of Recorder Bates.

I certify that a lot of two arpens in the village of Little Prairie, in the county of New Madrid, which appears from the books of this office to be owned by J. Smith, has been materially injured by earthquakes. And that in conformity to the provisions of the act of Congress of 17th February, 1815, the said J. Smith, or his legal representatives, is entitled to locate any quantity of land, not exceeding one hundred and sixty acres, on any of the public lands of the Territory of Missouri the sale of which is
16 authorized by law.

(Signed) FREDERICK BATES.

OFFICE OF U. S. RECORDER OF LAND-TITLES,
St. Louis, April 30th, 1872.

This is to certify that the above is a correct copy of New Madrid certificate No. 159, as the same is kept, up to this day, on file in this office.

STILLMAN O. FISH, *Recorder.*

5th. List of patent-certificates dated 4 June, 1823, patent-certificate No. 323.

The patent-certificate No. 323 referred to is in the words and figures following, to wit:

A list of patent-certificates prepared for issue by the recorder of land-titles under the act of Congress of 17th Feb'y, 1815, (and the supplementary acts,) for the relief of those inhabitants of the county of New Madrid who suffered by earthquakes:

List of patent-certificates.

Date.	No. P. C.	No. L. C.	Original claimants.	Quantity in acres.	To whom del'd.
1823. June 4th.	323	159	J. Smith.	160	M. P. Leduc.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, April 20, 1872.

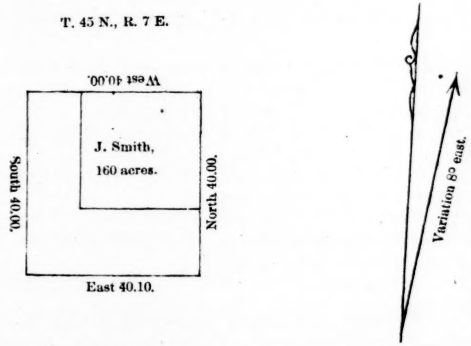
This is to certify that the foregoing is a correct extract from a book marked "New Madrid locations, relinquishments and patent-certificates," which book is up to this day preserved on file in this office.

(Signed) STILLMAN O. FISH, *Recorder.*

6th. United States survey, No. 2491, dated March 18, 1818, made by Joseph C. Brown, surveyor.

United States survey No. 2491, referred to, is in the words and figures following, to wit: U. S. survey, No. 2491.

Survey No. 2491, certificate No. 159, surveyed for J. Smith, or his legal representatives, 160 acres of land located by virtue of a New Madrid certificate. Recorded Feb. 16th, 1825.



17 Beginning at the center of the mound called for in his entry; thence south 12 ch's 50 l'ks to a point in Peltier's south boundary, 11 ch's east of his N. W. corner; thence east with Peltier's line 20 ch's set a post in the road for the S. E. corner (from which) no trees are near; thence north 30 ch's, a sink-hole 38 ch's, ditto 40 ch's, set stone the N. E. corner; thence west 40 ch's set stone, the N. W. corner of the survey and from which another stone, formerly set by some one, bears No. 48° W. 35 l'ks; thence south 40 ch's, set post 25 l'ks N. W. from the most north'ard of 2 sink-holes near together, and from which a hickory, 2 in's dia'r, bears No. 79° W. 30 l'ks; thence east 9 ch's 10 l'ks to Peltier's N. W. corner, 20 ch's 10 l'ks, the point in Peltier's line south of the mound from whence we started.

March, 1818.

JOSEPH C. BROWN, *D. S.*

OFFICE U. S. RECORDER OF LAND TITLES,
St. Louis, Mo., January 22, 1872.

I certify that the above survey, No. 2491, in T. 45, N. R. 7 E., is a true and correct copy as on file in Record Book A, page 100, which is still preserved up to date in this office.

(Signed) STILLMAN O. FISH, *Recorder.*

7th. Certified copies of abstracts from the records of the recorder's office, February 23rd, 1823.

The copies of abstracts referred to above are in the words and figures following, to wit:

Abstract from recorder's office.

Number of survey.	To whom granted or confirmed.	Number of certificate granting the right of relocation.	Area of the claim.	Nature of claim.	By whom surveyed.	Date of survey.
2,491	J. Smith.	159	160 acres.	N. M.	Jos. C. Brown.	March, 1818.

Where situated.		Original field-notes of survey.	Recorded.		When returned to the recorder of land titles.	Remarks.
Township.	Range.		Book.	Page.		
45 N.	7 east.	Pub. vol. 23.	A.	100	26th February, 1823.	

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, April 20, 1872.

This is to certify that the foregoing is correctly extracted from a book marked "Index Private Surveys," which book is up to this day preserved on file in this office.

(Signed) STILLMAN O. FISH,
Recorder.

18 8th. Bond from J. Smith to Andrew P. Gillaspie.

The bond referred to is in the words and figures following, to wit:

Bond of J. Smith to Andrew P. Gillaspie.

This indenture, made and entered into this fourteenth day of April, in the year of our Lord one thousand eight hundred and sixteen, between J. Smith, of Little Prairie, in the district of New Madrid, and Territory of Missouri, and Andrew P. Gillaspie, of New Madrid district, aforesaid, witnesseth that for and in consideration of the sum of one hundred dollars, lawful money, well and truly paid, and the further sum of fifty dollars, and other considerations hereinafter to be paid as agreed upon, I, the said J. Smith, hereby agree to and will convey to the said Gillaspie, his heirs, or assigns, and make over by good and sufficient deed of conveyance, all my lots in the village of Little Prairie which were granted and confirmed to me.

Given under my hand and seal the day and year aforesaid.

(Signed) J. $\overset{\text{his}}{\underset{\text{mark.}}{+}}$ SMITH. [SEAL.]

Signed, sealed, and executed in the presence of us.
ROB'T WALLACE,
UPTON C. BUTLER.

MISSOURI TERRITORY, *New Madrid County, ss:*

Be it remembered that before me, the undersigned, one of the justices of the peace within and for the county aforesaid, personally appeared the above-named J. Smith, and acknowledged the foregoing instrument of writing to be his act and deed, hand and seal, for the purposes therein mentioned.

Given under my hand this 29th day of April, 1816.

(Signed) GEORGE TENNILLE, *J. P.*

STATE OF MISSOURI, *County of New Madrid, ss:*

I, John A. Mott, clerk of the circuit court, and ex-officio recorder in and for said county and State, do hereby certify that the annexed instrument of writing was filed for record, and duly recorded in Book 23, page 356, of the records of said county, this 22nd day of April, A. D. 1872.

Witness: John A. Mott, clerk of the court aforesaid, with the seal of said court hereunto affixed, at office, the day and date aforesaid.

[SEAL.] (Signed) JOHN A. MOTT,
Clerk and ex-officio Recorder.
By ALB'T O. ALLEN, *Deputy.*

19 9th. Deed of J. Smith to Andrew P. Gillispie, dated 5th March, 1819. The deed referred to in the foregoing is in the words and figures following, to wit:

Deed of J. Smith to Andrew P. Gillespie, dated 5th M'ch, 1819.

Know all men by these presents that I, J. Smith, of the county of New Madrid, lately of the village of Little Pr*ia*rie, do, for and in consideration of one hundred and fifty dollars to me in hand paid by Andrew P. Gillespie at and before the ensealing and delivery of these presents, grant, bargain, and sell, alien and convey unto the said Andrew P. Gillespie, his heirs and assigns, all those two certain arpens of land in the village of Little Prairie, in the Territory of Missouri, confirmed by the late board of commissioners to ; and I also grant, bargain, and sell every certificate or *certificate or* certificacy of location in the Territory of Missouri on any land the sale of which is authorized by law, hereby covenanting to warrant and defend the title to the said certificate of new location and the land to the said Andrew P. Gillespie, his heirs and assigns, forever.

In testimony whereof I, the said J. Smith, have hereunto set my hand and seal this fifth day of March, one thousand eight hundred and nineteen.

his
(Signed) J. + SMITH. [SEAL.]
mark.

In presence of us.
JESSE PRINDLE.
H. HARBISON.

TERRITORY OF MISSOURI,
County of New Madrid, ss:

I, Enoch Evans, clerk of the circuit court for the county of New Madrid, in the southern circuit of the Territory of Missouri, do certify that J. Smith appeared personally before me, and he acknowledged the within indenture to be his act and deed, hand and seal, for the uses and purposes therein mentioned. In testimony whereof I have hereunto set my hand and seal this fifth day of March, 1819, and having used my private seal, there being no official seal yet provided.

ENOCH EVANS, *Clerk.* [SEAL.]

Filed and recorded August 23rd, 1871.
(Signed) W. C. KENNETT, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss :

I, the undersigned, recorder for said county, certify the foregoing to be a true copy from book 431, page 407, in my office. Witness my hand and official seal this 18th day of April, 1872.

W. C. KENNETT, *Recorder.* [SEAL.]

20 *Admission that the title conveyed by Smith to Gillespie is vested in plaintiff; also, admission as to value of property, rents, etc.*

The defendant, for the purposes of this action, and in this case only, admitted that whatever title had been conveyed by J. Smith to Andrew P. Gillespie was vested in the plaintiff in this suit, and the property in dispute in this case was of the value of five thousand dollars, and that the monthly rents and profits thereof w*as* of the value of fifty dollars.

Here the plaintiff closed his case for the present.

Defendant's testimony.

The defendant then offered in evidence the following documents:

1st. A patent issued by the United States to J. Smith, with the endorsement thereon that the same was delivered or sent to William Russell.

The plaintiff, by his counsel, objected to the admission of said patent and the endorsement thereon in evidence, because the said patent was void in consequence of having been located upon land the sale of which was not authorized by law; 2nd, because said patent had been judicially decided by the Supreme Court of the United States to be null and void in the case of Easton vs. Salisbury, (21st Howard's Reports, page 426; Stoddards vs. Chambers, 21st Howard's, 284; Mills vs. Stoddard, 8 Howard, 364;) 3rd, because it was located upon land reserved from sale and was not located in accordance with sectional and greater sectional lines, and was upon land not surveyed, and was not located in season to be validated by the act of Congress approved April 26, 1822.

The court overruled the objections so made by the plaintiff, and permitted said patent to be read in evidence.

D. S. A. F.] DEPARTMENT OF THE INTERIOR,
GENERAL LAND-OFFICE,
Washington, D. C., July 17, 1872.

I, Willis Drummond, Commissioner of the General Land-Office, do hereby certify that the annexed are true and liberal exemplifications from the records and files of this office of the following: Relinquishment by Rufus Easton to the United States of three tracts of land in the county of New Madrid; 2. Patent, dated May 28, 1827, in favor of J. Smith, or his legal representatives; 3. Extract of a letter dated
21 May 31, 1827, to W'm Russell, esq., S't Louis, M'o. In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Signed) WILLIS DRUMMOND,
Commissioner of General Land-Office.

Patent from the United States to J. Smith, or his legal representatives.—
Sent to William Russell, S't Louis, 31*st* May, 1827.

The United States of America to all whom these presents shall come, greeting:

Know ye that there has been deposited in the General Land-Office a certificate, numbered three hundred and twenty-three, of the recorder of land titles at S't Louis, Missouri, whereby it appears that, in pursuance of the act of Congress approved on the seventeenth day of February, one thousand eight hundred and fifteen, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," & of the several acts of Congress amendatory and explanatory of the same, J. Smith or his legal representatives have located a tract of land containing one hundred and sixty acres, bounded and described as follows, to wit:

Beginning at a point in Peltier's north boundary, eleven chains east of his northwest corner, & twelve chains and fifty links south of the centre of a mound; thence east with Peltier's line twenty chains to a post in the road for southeast corner; thence north at thirty chains a sink-hole; at thirty-eight chains a sink-hole; forty chains to a stone for northeast corner; thence west forty chains to a stone for the northwest corner, from which a stone bears north forty-eight degrees west, distant thirty-five links; thence south forty chains to a post, twenty-five links northwest from the most northwardly of two sink-holes near together, and from which a hickory two inches in diameter bears north, seventy-nine degrees west, distant thirty links; thence east at nine chains and ten links, Peltier's northwest corner, twenty chains and ten links to the point of beginning, being in
township forty-five north of the base line of range seven east of
22 the fifth principal meridian line, and being survey number two
thousand four hundred and ninety-one.

There is, therefore, granted by the United States unto the said J. Smith, or his legal representatives, & to his or their heirs, the tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said J. Smith or his legal representatives, & to his or theirs heirs and assigns forever.

In testimony whereof I, John Quincey Adams, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office *Office* to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and twenty-seven, and of the Independence of the United States the fifty-first.

By the President.
(Signed) J. Q. ADAMS.

(Signed) GEORGE GRAHAM,
Comm'r of the Gen'l Land-Office.

To which ruling and decision of the court in overruling the objections so made by the plaintiff, and permitting said patent and the endorsement thereon to be read in evidence on the trial, the plaintiff, by his counsel, instantly excepted in writing.

The defendant next offered in evidence a deed from James Smith, blacksmith, of Cape Girardeau, to Rufus Easton, for lots number nine and ten in the village of Little Prairie, dated 22nd October, 1816.

To the receiving of said deed in evidence on the trial of this case the plaintiff, by his counsel, instantly objected in writing, because it could not be presumed that a deed from James Smith, blacksmith, of Cape Girardeau, was a deed from J. Smith, of New Madrid. The objection of the plaintiff to permitting said deed to read in evidence on the trial of the cause was overruled by the court, and said deed was read in evidence accordingly, and which said deed is as follows:

23 (Copy.)

Deed from James Smith, blacksmith, to Rufus Easton, dated 22nd October, 1816.

On the twentieth day of November, 1816, received for record, and the same day recorded the following deed:

This deed, made this 22nd day of October, 1816, by and between James Smith, blacksmith, and Sarah, his wife, both of the county of Cape Girardeau, in the Territory of Missouri, of the one part, and Rufus Easton, of the town of St. Louis, in said Territory, of the other part, witnesseth, that the said James Smith and wife, for and in consideration of three hundred and twenty dollars to them in hand paid, the receipt whereof they do hereby confess & acknowledge; and the said Rufus Easton, from the payment thereof do discharge, have, and by these presents do, grant, bargain, sell, and assign to the said Rufus Easton, his heirs and assigns forever, two arpens of land, situate at the village of the Little Prairie, in the county of New Madrid, and Territory of Missouri aforesaid, granted to the said James Smith by the late board of commissioners appointed for the adjustment of land-titles in said Territory, by the name and description of J. Smith, and known on their books by claim and certificate No. 1116; also a town-lot of ground in the town of New Madrid, in the county of New Madrid aforesaid, of one arpent, originally granted to the said James Smith, by Don Henry Peyroux, on the 24th September, 1806, as by concession of that date, and confirmed to him, said James Smith, under the laws of Congress by the recorder of land-titles for the said Territory; which said lots of ground and tracts of land have been materially injured by earthquakes, and the like quantity, or any quantity of land not exceeding one hundred and sixty acres for each lot, can, according to the provisions of the act of Congress entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," approved February 17th, 1815, be
24 located on any of the public lands of the said Territory, the sale of which is authorized by law; which right and privilege of location, and the land so to be located, the said James Smith and wife do, for the consideration above-mentioned, also grant, bargain, sell, and assign unto him, the said Rufus Easton, and to his heirs and assigns forever; to have and to hold the said lots of ground and land above described, with right and privilege of location as aforesaid, unto him, the said Rufus Easton, and to his heirs and assigns, and to his & their only use and benefit forever.

In witness whereof they, said Smith and wife, do hereunto set their hands & seals, the day and year first-above written.

JAMES SMITH. [SEAL.]
her
SARAH + SMITH. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
JOHN C. HARBISON.
DAVID SMITH.

MISSOURI TERRITORY,
Cape Girardeau County, ss:

Before me, the undersigned, judge of the circuit court in and for the southern circuit of the Territory of Missouri, personally came, on the twenty-second day of October, in the year of our Lord one thousand eight hundred and sixteen, the within named James Smith, and Sarah, his *Sarah, his* wife, and acknowledged that they signed, sealed, and delivered the within conveyance to the *to the* within-named Rufus Easton, as their and each of their acts and deed, for the purposes in the same mentioned.

And I having examined the said Sarah, wife of the said James Smith, separate and apart from her husband, who also acknowledged that she, on her part, did freely execute and deliver the same, without any manner of coercion, constraint, or fear, made use of toward her, by her said husband, that the same is her voluntary act and deed.

Given under my hand.

RICHARD T. THOMAS.

STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit court, and ex-officio recorder within and for the county of New Madrid aforesaid, do hereby certify that the above and foregoing is a full, true, and complete
25 transcript of the original record of a deed from James Smith and wife to Rufus Easton, together with the certificates of record and acknowledgment of same, as fully as the same appears of record on pages 176 & 177 of book No. 8 of the records of said county.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office in the town of New Madrid, this 12th day of May, A. D. 1853.

Given under my hand.

[SEAL.] RICHARD H. HATCHER, *Clerk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for said county, certify that the foregoing instrument of writing was filed for record in my office, July 19, 1853, and is truly recorded in Book R, No. 6, page 303.

Witness my hand and official seal the date aforesaid.

[SEAL.] S. D. BARLOW, *Recorder.*

To the ruling and decision of the court in overruling the objections of the plaintiff, and permitting said deed to be read in evidence, the plaintiff, by his counsel, instantly excepted in writing.

Admission by pl'ff that the title from James Smith, blacksmith, is vested in defendant, also as to possession of property in controversy, etc.

The plaintiff, for the purposes of this present action, and in this case only, admitted that whatever title passed by the conveyance of James Smith, blacksmith, to Rufus Easton was vested in the present defendant. The plaintiff admitted the defendant had been in possession of the premises in dispute for more than ten years before the commencement of this suit, and that said Rufus Easton had conveyed to Russell prior to 1827, & he afterwards conveyed to defendant.

Testimony of W'm H. Cozzens.

The defendant called as witness one William H. Cozzens, who was sworn, and who testified that his occupation was that of a civil engineer and surveyor, *which* he had followed the business thirty-seven or eight years; know the land in dispute, and proved the possession of Easton for more than ten years, which had been admitted, & the extent of his enclosure.

Being cross-examined by the plaintiff's counsel:

That he knew this united survey No. 2491, made on New Madrid certificate No. 159, by heart; that it is not located upon sectional or quarter sectional lines, but it lies north and south; it does
26 not coincide with the sectional lines anywhere; he, witness, began surveying in this county in the year 1835. The survey in this case did not coincide with sectional or quarter sectional lines anywhere.

The defendant also gave in evidence an act of Congress to perfect certain locations, approved 26th April, 1822. (Stat. at Large, vol. 3, p. 668.)

The act referred to above is in the words and figures following, to wit:

Chap. XL.—An act to perfect certain locations and sales of public lands in Missouri.

Statute 1, Ap'l 26, 1822, 1827, C. H. 34.

Locations of warrants made under the act of Feb. 15, 1815, if made in pursuance of that act in other respects, shall be perfected into grants, &c. Act of Feb. 17, 1815, ch. 45. The sales of fractions from such locations valid, &c. Hereafter, holders, &c., of such warrants are to conform, &c., and such warrants to be located within a year, or they will be null.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the locations heretofore made of warrants issued under the act of the fifteenth of February, one thousand eight hundred and fifteen, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," if made in pursuance of the provisions of that act, in other respects, shall be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys; and the sales of fractions of the public lands heretofore created by such locations shall be as valid and binding on the United States as if such fractions had been made by rivers or other natural obstructions.

SEC. 2. *And be it further enacted,* That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional or quarter sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit; and all such warrants shall be located within one year after the passage of this act; in default whereof the same shall be null and void. Approved April 26, 1822.

Here the defendant rested his case.

The plaintiff, in rebuttal, offered the followed evidence:

Pl'ff's evidence in rebuttal.—Testimony of E. H. Hesse.

E. H. HESSE, being recalled, stated as follows:

The books I have in my possession. The name of the book which I hold in my hand, "The field-notes of survey of township forty-five north, 27 range seven east of the fifth principal meridian and exterior boundary lines of private surveys." It contains the sectional lines. There is no record of the quarter-sectional lines. It is not laid off into one hundred and sixty acre tracts. The first date of sectional survey is after some pages of field-notes. It is April 30th, 1818.

Here it was admitted by both parties that the survey No. 2491 was returned to the recorder Feb'y 23rd, 1823.

Witness proceeded to state, the first sectional was run between 33 & 34, and then there are a number of others, and at the bottom of the page the date appears, April 30, 1818. This survey of township forty-five was returned to the surveyor-general; that is, the plat is dated Dec. 11, 1824. Said there was no evidence he knew of in the book that the first plat*t* was made before that date.

Being asked when was the last sectionalizing done, according to this book of this township, said: "I see a date here that refers to about the last sectionalizing—the 23rd June, 1819." These were the field-notes of Brown. There is no other return made by Deputy-surveyor Brown that the surveyor-general made out his plat*t* from the field-notes of the deputy-surveyor.

Being cross-examined by defendant's counsel, said he did not know anything about this except these books and plats. Had no information upon the subject except what he got from the books.

Re-examined, said: These are the books on file in the United States surveyor's office, and in the office kept by witness. Witness has been in the office about two years. Plaintiff then offered said books in evidence.

The following is the exstract said books offered in evidence, as here stated, viz:

Extracts from books in office of the custodian of archives.

Extracts of the field-notes of the surveys of sectional lines in fractional township 45 north of the base line, range 7 east of the 5th principal meridian. Bet. sec. 33 & 34, T. 45 N., R. 7 E.: North.

28 Set ¼ sec. post, from which a hickory, 3 in. dia., S. bears ¼ W. 25 l.; do., 3 in. dia., bears S. 80 W. 20 l. 40.00.

Set stone corner to sec. 27, 28, 33, 34. Rolling, thin soil; black-jack & hickory bushes. 80.00.

Between sec. 27 & 34, T. 45 N., R. 7 E.: East.

Set post in mound. 40.00.

Set post in mound corner to sec. 26, 27, 34, & 35. Land similar to the last. 80.00.

Between sec. 26 & 35, T. 45 N., R. 7 E.: East.

Intersected the west boundary of Pratt's tract, 1 ch. 50 l. S. of his S.W. corner; set stone for corner. Land as before. 5 ch's 70 l'ks.

Between sec. 34 & 35, T. 45 N., R. 7 E.: South.

Intersected S. Bent's line, on the road; set post, from which a stone, Bent's N.W. corner, bears N. 82 E. 179 l. Land as before. 8.73.

Between sec. 26 & 27, T. 45 N., R. 7 E.: North.

Intersected Madam Chouteau's tract, 13 ch. 27 l. W. of her beginning corner, where set stone. Land similar to the last. 27.50.

Between sec. 27 & 28, T. 45 N., R. 7 E.: North.

40.00. Set ¼ sec. stone.

54.00. Intersected Madam Chouteau's tract, 16.40 E. of S.W. corner. Set stone for corner. Land as before.

From a point in Madam Chouteau's north line, 8.70 east of her N.W. corner.

North. Between sec. 27 & 28, T. 45 N., R. 7 E.:

14.00. Set post corner to sec. 21, 22, 27, 28, in mound. Land broken and poor; thick w'g'th of oak bushes, &c.

North. Between sec. 21 & 22, T. 45 N., R. 7 E.:

40.00. Set ¼ sec. post in mound.

44.00. Creek 30 l. wide, bears E.

29 47.35. Intersected Chouteau's S. boundary, where set post, 45.37 W. of McHay's corner, on his line; b'-o. 3 bears S. 72 S.W. 31 l., & a b.-jack 2 bears N. 83, east 35 l. Land lies well; good soil.

East. Between sec. 22 & 27, T. 45 N., R. 7. E.:

40 00. Set ¼ sec. post in mound.

80.00. Set stone corner to sec. 22, 23, 26, & 27. Broken and poor; very bushy.

East. Between sec. 23 & 26, T. 45 N., R. 7 E.:

3.05. Intersected Soulard's W. boundary, where set post 1 ch. 73 l. S. of his corner on Mackay, r.-o., 2 in., N. 78 E. 15 l. & a do., 2 in dia., bears

30

31 N. 35, W. 20 l'k.

North. Between sec. 23 & 22, T. 45 N., R. 7 E.:

2.70. Intersected Mackay's S. boundary, 4 ch. 10 l. W. of Soulard's corner, & 46 ch. 8 l. east of Mackay's corner. Set stone for corner.

South. Between sec. 26 & 27, T. 45 N., R. 7 E.:

4.50. Intersected Soulard's W. boundary. Set stone 7 ch. southerly of his corner on Mackay.

West. Between sec. 21 & 28, T. 45 N., R. 7 E.:

40.00. Set ¼ sec. post, from which r.-o., 4 in dia., bears S. 20 W. 30; do., 3 in. dia., bears N. 1 E. 8 l'ks.

62.50. Intersected the E. boundary of the common fields of Prairie Denoye, 38 ch. 10 l. S. of the N.E. corner. Set post 30 l. S. of a stone in s'd line. April 30th, 1818.

OFFICE OF THE CUSTODIAN OF ARCHIVES
OF U. S. SURVEYS IN MISSOURI,
St. Louis, November 14th, 1872.

I hereby certify that the above are true extracts of the original field-notes of the survey by the United States of the sectional lines in township 45 N., R. 7 east, all under date of April 30th, 1818, as the same appear on pages 168 to 178, inclusive, of vol. 23 of the General Series of the State of Missouri, which are kept up to this day on file in this office.

[SEAL.] E. H. HESSE, *Custodian.*

32

33 Plaintiff next gave in evidence a letter dated 15th September, 1823, from the Commissioner of the General Land-Office, Geo.

Graham, to William Christy, register of the land-office at St. Louis, which said letter and the extract therein referred to are as follows:

Letter from General Land-Office to W'm Christy.

GENERAL LAND-OFFICE, *15th September*, 1823.

SIR: Your letter of the 21st ult. was received on the 13th instant, when you were informed that it would submitted to the Secretary of the Treasury, which has been done; but as the Secretary is now in Virginia, and it will be therefore some days before an answer can be had, and as your sale will commence on the 3rd Monday of October, I have thought proper for the present to instruct you to withhold from sale all the fractions which may be caused by the unconfirmed private claims. If these claims should not be confirmed, the fractions will disappear. If they should be confirmed, the lands will then sell for a better price than at the present time. I have also thought it proper, on account of the pressure as to time, to give you an extract from my letter to Mr. Crawford; for whether the instructions to you may or may not conform to this recommendation, yet if the purport of it is made known generally to the claimants it may stimulate them to have their surveys made and returned in time to prevent embarrassment at the public sale.

Yours, very respectfully,
(Signed) GEORGE GRAHAM.

WILLIAM CHRISTY, Esq.,
Register, St. Louis, Mo.

LAND-OFFICE, *St. Louis, Mo., May* 15, 1856.

I hereby certify that the foregoing is a true copy of a letter from Geo. Graham to William Christy, esquire, register, St. Louis, Mo., dated 15 Sept., 1823, now on file in this office.

D. C. TUTTLE, *Register.*

Extract referred to in the above letter.

(Extract.)

GEN'L LAND-OFFICE, 15 *Sept.*, 1823.

The question, however, now to be decided is, how are the claimants
of unconfirmed claims to be compelled to survey and have laid down on
the register's plat*t* their respective claims at their own expense, and in
time to prevent embarrassment at the ensuing public sales? The
34 only effectual mode of accomplishing these objects which occurs
to me is, to direct the recorder to place immediately in the hands
of the surveyor-general a transcript from his books of all such claims,
and give public notice to the claimants that if they do not cause their
respective claims to be surveyed by the proper officer, at their own expense and in time to be platted down on the register's plat, that the
lands will, in consequence of their neglect to do so, be subject to be sold
at the ensuing public sale.

LAND-OFFICE, *St. Louis, Mo., May 15th*, 1856.

I hereby certify that the above is a true copy of a paper on file in this office, and which accompanies a letter dated Sept. 15, 1823, from Geo. Graham to William Christy, esq.

D. C. TUTTLE, *Register.*

The plaintiff then gave in evidence New Madrid certificate No. 160, to lot in the town of New Madrid, made by Recorder Bates to James Smith, dated 20th November, 1815.

Certificate No. 160, referred to above, is in the words and figures following, to wit:

New Madrid certificate No. 160, dated 20th Nov., 1815.

No. 160, James Smith, 160 acres.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, Nov. 20th, 1815.

I certify that a lot of one arpen in the town of New Madrid, in the county of New Madrid, which appears from the books of this office to be owned by James Smith, has been materially injured by earthquakes, and that in conformity to the provisions of the act of Congress of 17th February, 1815, the said James Smith, or his legal representatives, is entitled to locate any quantity of land, not exceeding one hundred and sixty acres, on any public lands of the Territory of Missouri the sale of which is authorized by law.

FREDERICK BATES.

George Crump enters for James Smith or his legal representatives 160 acres of land in virtue of a certificate, No. 160, issued by Frederick Bates, esq., recorder of land titles, dated Nov. 20th, 1815, beginning at a Spanish oak, on the line between ranges Nos. 13 & 14, west of the fifth principal meridian, township No. 49, north of the base line; said
35 Spanish oak stands on the northeast side of the Lickfork of the Roche Perche Creek, about one and a half miles below the Lick, running from the said beginning west at right angles to said range line, 160 poles; thence south 160 poles; thence east 160 poles to said range line; thence north with said line and passing the corner of sec's Nos. 24 & 25, township No. 49, north range No. 14, west to the beginning.

GEORGE CRUMP.
W'M RECTOR,
Surveyor, &c.

5TH NOVEMBER, 1816.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, Sept. 13th, 1872.

This is to certify that the foregoing certificate, No. 160, with accompanying letter, is correctly copied from a book of original papers marked "New Madrid certificates and locations," which is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

Which was objected to by the defendant's counsel; the objection was overruled by the court, & the same was read in evidence.

The plaintiff next gave in evidence an extract from a certificate dated the 21st March, 1824.

Which extract is in the words and figures following, to wit:

Extract of certificates of Henry Peyroux.

Extract of certificates of Henry Peyroux, commandant of the district of New Madrid, in favor of the inhabitants, for lands granted to them by him, dated 21 March, 1804.—No. 1369.

P'r emplacements à la ville: 72, de Gabriel Hunot, rue Dauphine et
St. Eulalie; 73, de Joseph Hunot, père, au coin de la rue Royal*le* et St.
Eulalie; 74, de Jean Baptiste Langlois, au coin des rues St. Joseph et
St. Marcise; 75, d'André Wilson, au coin des rues Royal*le* et St. André;
76, de Gabriel Hunot, fils, au coin rues Dauphine et St. Louis; 77, de
Joseph Lafernay, p'r 2 arpents, rue St. Joseph, entre celle St. Eulalie
et la rue Royal*le*; 78, de Manuel Violot, au coin des rues St. Eulalie et
Dauphine; 79, de François Langlois, au coin des rues Royal*le* et St.
Narcisse; 80, de Joseph Hunot, fils, au coin des rues Royal*le* et St.
Louis; 81, de James Smith, au coin des rues St. Eulalie et St. Ignace;
82, de Pierre Gascon, au coin des rues Dauphine & St. Pié; 83, André
Goder, au coin des rues St. Pierre et Dauphine; 301, Rich'd Jones
36 Waters, 8 arpents, entre la Bayon St. Jean et celui St. Thomas;
302, François Riche Dupin, 2 arpents, front à la rue St. Cyprica;
303, Nicolas Dapron, 1 arpent, au coin des rues d'Espagne et St. Ignace;
304, Joseph Dumay, 1 arpent, au coin des rues d'Espagne et St. Andrié;
305, Ét'e Dumay, au coin des rues St. Ignace et St. André; 306, Michel
Bontronce, 2 arpents, au coin des rues Dauphine et St. Pié; 307, François St. Marie, 2 arpents, au coin des rues St. Ignace et St. Gilleaume;
308, Fr'çois St. Marie, 1 arpent, front à la rue St. Ignace et la rue St.
Narcisse; 309, J. B'te St. Marie, 1 arpent, au coin des rues St. Guillaume
et St. Narcisse; 310, Jean B'te Olive, 2 arpents, au coins de rues St.
Eulalie et St. Ignace; 311, Lue Devore, 2 arpents, au coin des rues
d'Espagne et St. Eulalie; 312, Jl. Master, 2 arpents, au coin des rues
d'Espagne et St. Louis; 313, Lemuel Master, 2 arpents, au coin des rues
St. Ignace et St. Eulalie; 314, Robert Master, 2 arpents, au coin des rues
St. Guillaume et St. Eulalie; 315, Louis Baby, 2 arpents, au coin des
rues d'Espagne et St. André; 316, Ambroise Séraphim, au coin des rues
St. Guillaum' et St. Eulalie; 317, Joseph Laplante, 1 arpent, au coin des
rues d'Espagne et St. Laurent; 318, J'n B'te Thibeault, 1 arpent, au
coin des rues Dauphine et St. Laurent; 319, G'ge Germain, 2 arpents, au
coins des rues d'Espagnes et St. Narcisse; 320, J'n Baptiste Chartier, 1
arpent, au coin des rues Dauphin et St. Laurent; 321, Rich'd Master*s*, 2
arpents, au coin des rues St. Ignace et St. Louis.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, September 13th, 1872.

This is to certify that the foregoing list of certificates of Henry Peyroux is correctly copied from pages 302 & 303 of book marked E, which is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

Translation.

Locations (or lots) in the town: 72, of Gabriel Hunot, Dauphin
37 and St. Eulalie streets; 73, of Joseph Hunot, s'r, at the corner of
Royal and St. Eulalie streets; 74, of Jean Baptiste Langlois, at
the corner of St. Joseph and St. Narcisse streets; 75, of André Wilson,
at the corner of Royal and St. André streets; 76, of Gabriel Hunot, jr.,
at the corner of Dauphin and St. Louis streets; 77, of Joseph Laffernay, two arpents, St. Joseph street, between St. Eulalie and Royal streets;
78, of Manuel Violet, at the corner of St. Eulalie and Dauphin streets;
79, of François Langlois, at the corner of Royal and St. Narcisse streets;
80, of Joseph Hunot, jr., at the corner of Royal and St. Louis streets;

81, of James Smith, at the corner of St. Eulalie and St. Ignace streets; 82, of Pierre Gascon, at the corner of Dauphin and St. Pierre streets; 83, André Goder, at the corner of St. Pierre and Dauphin streets; 301, Rich'd Jones Waters, eight arpents, between the Bayou St. Jean and that of St. Thomas; 302, François Riche Dupin, two arpen's, front on St. Cyprica street; 303, Nicholas Dapron, one arpent, at the corner of Spanish and St. Ignace streets; 304, Joseph Dumay, one arpent, at the corner of Spanish and St. André streets; 305, Et'e Dumay, one arpent, at the corner of St. Ignace and St. André streets; 306, Michael Bontronce, two arpents, at the corner of Dauphin and St. Pierre streets; 307, François Ste. Marie, two arpents, at the corner of St. Ignace and St. William streets; 308, Fr'çois Ste. Marie, one arpent, front on St. Ignace street and St. Narcisse street; 309, Jean Baptiste Ste. Marie, one arpent, at the corner of St. William and St. Narcisse streets; 310, Jean Baptiste Olive, two arpents, at the corner of St. Eulalie and St. Ignace streets; 311, the Lue Devore, two arpents, at the corner of Spanish and Ste. Eulalie streets; 312, Jl. Master, two arpents, at the corner of Spanish and St. Louis streets; 313, Lemuel Master, two arpents, at the corner of St. Ignace and St. Eulalie streets; 314, Robert Master, two arpents, at the corner of St. William and Ste. Eulalie streets; 315,
38 Louis Baby, two arpents, at the corner of Spanish and St. André
streets; 316, Ambroise Seraphim, one at the corner of St. William and Eulalie streets; 317, Joseph Laplante, one arpent, at the corner of Spanish and St. Laurent streets; 318, Jean Baptiste Thibeault, one arpent, at the corner of Dauphin and St. Laurent streets; 319, G'ge Germain, two arpents, at the corner of Spanish and St. Narcisse streets; 320, Jean Baptiste Chartier, one arpent, at the corner of Dauphin and St. Laurent streets; 321, Rich'd Masters, two arpents, at the corner of St. Grace and St. Louis streets.

I have examined the above translation and find it correct.

C. GIBSON, *P. D.*

ST. LOUIS, *Nov.* 12, 1872.

Also a grant of land made to James Smith in Big Prairie, certificate No. 356, by Recorder Bates.

Certificate of Recorder Bates, numbered 356.

No. 356.—James Smith, 300 arpens.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, Jan'y 15, 1818.

I certify that a tract of three hundred arpens of land, situated in Big Prairie, County of New Madrid, which appears from the books of this office to be owned by James Smith, has been materially injured by earthquakes; and that, in conformity to the provisions of the act of Congress of 17th February, 1815, the said James Smith, or his legal representatives, is entitled to locate three hundred arpens of land on any of the public lands of the Territory of Missouri the sale of which is authorized by law:

(Signed) FREDERICK BATES.

For confirmation, vide Com's Min's, vol. 5, page 25. Also a deed from James Smith, the blacksmith, to Edward Robinson, dated 1814.

Deed from James Smith to Edw'd Robinson.

Deed.—Pardevant nous D'n Henry Peyroux de la condernière capt. des armés de S. M., & comd't civil *and* militaire du poste, & d'c't de N'lle Madrid, & sousigné, fut présent S'r James Smith, forgeron & habitant de ce poste, lequel à par ces présents fait bail & donne pour
39 deux au consécutives à partie de ce jour, au S'r Edward Robinson, aussi habitant de ce poste, réprésenté par la S'r Dennis Sullivan, habitant de ce poste, une plantation, située en ce d'c't, au lieu dit la Grande Prairie, faisant front au lac St. Marie, ténant d'un côté à l'habitation du S'r Jacob Wheat, et de l'autre à celle du S'r Jean Frazer, & par derrière au chemin du roy & ainsi que la dite habitation se pour suit & comporte pour par le dit S'r Edw. Robertson, en jouir, en bon fermier, pendant les dits deux années, le présent bail est faite aux charges, clauses, & conditions suivant: 1°. Que pendant le cours des dits 2 années le dit S'r Edw'd Robinson, promet & s'oblige, de faire sur la plantation à lui ci-dessus louée les défrichements, estabissements & chemins du roy ordonné par la loix pour pouvoir en obtenir le titre de propriété. 2°. Moyennant le prix & somme de $150 que le S'r James Smith, reconnait avoir reçue comptant & dont il quitte & décharge le dit S'r Edward Robertson. 3°. Et enfin sous la condition qui si dans 2 ans de ce jour, terme de l'expiration du présent bail, la dite habitation cy-dessus louée de 265 à de terre est défrichée & establie conformément aux intentions de la loy qu'elle appartiendra in toute propriété & jouissance au dit S'r Edward Robertson & le James Smith, promet & s'oblige d'en soliciter la titre de propriété de l'intendant-général de cette province, & d'en passer en suite vente en régle par devant le com'd't de ce poste sans autre déboursé de la part du S'r Robertson que du prix du dit titre de propriété & acte de vante qui doir s'en suivre reconnaisant le S'r Ja's Smith être entièrement satisfait du prix de la dite plantation par l'exécution complète des conditions cy-dessus de la part du S'r Edward Robertson.

Faite & passé à la N'lle Madrid, le 27 de février étant témoins d'as'istance P. A. Laforge & S'r Joseph Lafernat, com'ercant de ce poste.

(Signed) JAMES SMITH.
EDW'D ROBERTSON.
JAMES SULLIVAN.
J'H LAFERNAT.
P. A. LAFORGE.

Pardevant nous com'd't de la N'le Madrid.
(Signed) HENRY PEYROUX.

40 Office of the U. S. Recorder of Land Titles,
St. Louis, May 1st, 1872.

This is to certify that the foregoing is a correct copy of a deed from James Smith to Edward Robertson, as the same is found on pages 453 & 454 of record-book A, which is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

Translation.—Deed from James Smith to Edw' Robinson.

(Translation.)

In the presence of us, D'n Henry Peyroux, (late) captain in the armies of his majesty, and civil and military commandant of the post and dis-

trict of New Madrid, and undersigned, came James Smith, blacksmith, and inhabitant of this post, who has, by these presents, leased and given for two consecutive years, dating from this day, to Edward Robinson, also an inhabitant of this post, represented by Dennis Sullivan, inhabitant of this post, a plantation located in this district, at a place called Grand Prairie, fronting on the lake Ste. Marie, bounded on one side by the residence (homestead) of Jacob Wheat, and on the other by that of Jean Frazer, and in the rear by the king's road, (so that the said homestead may be carried on and possessed by the said Edward Robertson in his avocation as a farmer,) during the said two years. The present leave is made subject to the provisions and conditions following. 1°. That during the space of the said two years the said Edward Robertson promises and binds himself to make upon the plantation leased by him aforesaid, the clearings, settlements, and roads of the king (highways) prescribed by the laws, in order to be able to obtain the title of property. 2°. Provided that the said James Smith acknowledges to have received the amount and sum of $150.00 in cash, of which he releases and discharges the said Edward Robertson. 3°. And finally, upon the condition that if within two years from this day, the time of the expiration of the present lease, the said homestead of 265 a. of land leased aforesaid is cleared and settled according to the intention of the
41 law, that it shall belong in sole property and enjoyment to the said Edward Robertson; and James Smith promises and binds himself to demand the title of possession of the intendant-general of this province, and to complete immediately a regular sale thereof before the commandant of this post, without other expense on the part of the said Edward Robertson than the cost of the title of possession and the act of sale which is to follow it, acknowledging the said James Smith to be entirely satisfied of the price of the said plantation by the complete performance of the aforesaid conditions on the part of Edward Robertson.

Made and completed at New Madrid on the 27th of February, being witnessed in the presence of P. A. Laforge and Joseph Lafernat, trader of this post.

(Signed) JAMES SMITH.
EDWARD ROBINSON.
DENNIS SULLIVAN.
J. LAFERNAT.
P. A. LAFORGE.

Before us, commandant of New Madrid.
(Signed) HENRY PEYROUX.

The above is, I believe, a correct translation.

O. GIBSON, *PD*.

Also certificate signed by Joseph Story, dated in 1815, which certificate is in the words and figures following, to wit:

Certificate signed by Joseph Story in 1815.

Claim.—John Frazer, ass'e of Edward Robertson, ass'ee of James Smith, claims 300 arp's of land, under the 2nd section of the act of Congress made and provided.

Order.—James Smith, 300 arpens of land.

SIR: You will survey to the above persons the quantity of lands prescribed, on the Big Prairie, beginning next to the lands already surveyed, leaving at the bridge 200 acres for the use of a town, given by order of Mr. Henry Peyroux, commander of this post.

May God prolong your days.

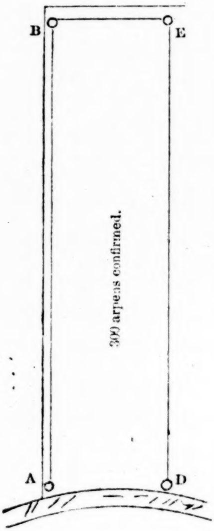
New Madrid, Oct. 10, 1799.

R. McCOY.

To Mr. J. STORER, *Surveyor*.

TERR'RY OF LOUISIANA, D'CT OF NEW MADRID,
17th of Dec., 1805.

That the above is a true copy of the original, and is attested
by Andrew Wilson, recorder, by order of
Capt. Henry Peyroux, to survey for
42 Jas. Smith three hundred arpens of
land in the large prairie, which I surveyed Feb'y 4th, 1800, on *on* the S. W. side, as followeth, viz: Beginning at A, a stake, the corner of a cross-road on the S. side of No. 1, in said prairie, near Lake St. Mary; thence with side-road N. 75° E. 33 a., to B, a post on the King's Road in said prairie; thence with King's Road S. 15° E. 9° 112 a., to E, a post, sweet gum and black oak; thence S. 75° W. 83·a., to D, a dogwood and sassafras near the aforesaid lake; thence with said lake to A, the beginning, containing three hundred arpens.



A true copy.
(Signed)

JOSEPH STORY, *Surveyor*.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, *Sept.* 13*th*, 1872.

This is to certify that the above is a correct copy from page 453 of record-book marked A, which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder*.

Also a survey of three hundred arpens made for James Smith by Joseph Story.

(The survey referred to is above set forth in the last preceding document.)

43 Also copy of deed from James Smith to Andrew P. Gillespie, dated April, 1815.

Copy of deed from James Smith to Andrew P. Gillespie, dated April, 1815.

On the second day of May, 1817, received for record and the same day recorded the following deed:

This indenture, made this third day of April, 1817, by and between James Smith, and Elizabeth Smith his wife, of the county of Mon*n*gom*a*ry, of the Territory of Mississippi, of the one part*e*, and Andrew P. Gillespie, of the county of New Madrid, and Territory of Missouri, of the other part*e*:

Witness, that for and in consideration of the just and full sum of one hundred and thirty dollars, lawful money of the United States, to them in hand paid by the said Gillespie to the said Smith and wife, at and before the ensealing and delivery of th*is* pre*a*sents, the receipt whereof is hereby acknowledged, he, the said James Smith, and Elizabeth, his wife, have this day granted, bargained, and sold, and by these presents grant, bargain, and sell, and forever quit claim to any grant of land lying and being in the county of New Madrid, and Territory of Missouri, and on the Mis'sippi, and in the township of Tywapity. It is to be understood that he, the said Smith, and wife, do sell all their right, title, interest, and claim, be the same more or less, to lands confirmed to said Smith, in said county of New Madrid, to the said Gillespie, his heirs or assigns forever, and they, the said Smith and wife, do agree to warrant and forever defend their right to said land, be the same more or less, to the said Andrew P. Gillespie, his heirs and assigns forever.

JAMES SMITH. [SEAL.]

her
ELIZABETH + SMITH. [SEAL.]
mark.

Given under our hands and seals this day and date above.
Signed, sealed, and delivered in the presence of us.

JAMES TANNER.

her
REBECCA + COLLINGUN.
mark.

TERRITORY OF MISSOURI, *County of New Madrid, ss:*

Be it remembered that on the second day of May, eighteen hundred and seventeen, personally came before me, Richard H. Waters, clerk of the circuit court in and for said county, James Tanner, and made oath according to law that he was present and saw the within-named deed signed; James Smith, and Elizabeth, his wife, sign, seal, and deliver, and heard them acknowledge the within instrument in writing to be their act and deed, hand and seal, for the purposes therein expressed, and that himself and Rebecca Cottengen subscribed the same as witnesses, the presence of said grantors, and in the presence of each other. 44

In testimony whereof, there being no judicial seal yet procured to said court, I have hereunto subscribed my name and affixed my private seal this day and date above written.

RICH'D H. WATERS, *Clerk.* [SEAL.]

STVTE OF MISSOURI, *County of New Madrid, ss:*

I, John A. Mott, clerk of the circuit court and ex-officio recorder in and for said county and State, do hereby certify the foregoing to be a full, true, and complete transcript of the record of deed from James Smith and

Elizabeth Smith to Andrew P. Gillespie, together with certificate of proof of execution thereof, as fully as the same now appears of record in my office.

In testimony whereof I hereunto sign my name and affix the seal of said court, at office in New Madrid, the seventh day of December, 1870.

[SEAL.] JOHN A. MOTT,
Clerk and ex-officio Recorder.

[5c. stamp, inter. rev.]

Also a deed from James Smith, the blacksmith, to Lewis and Day, dated August 17, 1838.

Deed from James Smith to Lewis & Day, Aug. 17, 1838.

CONVEYANCE.—This indenture, made and executed this seventeenth day of August, in the year of our Lord one thousand eight hundred
45 and thirty-eight, between James Smith, of the county of Stoddard, and State of Missouri, of the one part, and Chandler Lewis of Ouachita parish and State of Louisiana, and Robert Day of Catahoula parish and State of Louisiana, of the other part, witnesseth: That for and in consideration of one thousand dollars, in hand paid, the receipt whereof is hereby acknowledged, the said James Smith grants, bargains, and sells, and by these presents conveys to the said Chandler Lewis and Robert Day all the lands located for me and in my name, by virtue of what is usually called in the State of Missouri a New Madrid certificate granted by Frederick Bates, recorder of land-titles in the then Territory, now State of Missouri, be the same located where it may, which said certificate is numbered one hundred and fifty-nine; also one other certificate numbered one hundred and sixty; also one other certificate numbered three hundred and fifty-six; also one other certificate numbered two hundred and fifty-eight; also one other certificate numbered three hundred and thirty-four, and was granted to me by virtue of *other* provisions of a law of Congress passed in the year of our Lord one thousand eight hundred and fifteen, made for the benefit of sufferers by earthquakes in the year of our Lord one thousand eight hundred and twelve, who owned land in said county of New Madrid; and for a more perfect d*i*scription of the land so located by virtue of said certificate, reference is here made the records now remaining in the office of the recorder of land-titles, and the office of the surveyor-general, both located at the city of S't Louis, and State of Missouri, and also to the records now remaining in the General Land-Office at Washington City, with all the appurtenances thereto belonging; to have and to hold the said tract of land, with all its privil*id*ges thereto belonging, to the said Chandler Lewis and Robert Day, and their heirs and assigns forever, free from the claim of the said James Sm*y*th and his heirs; and the said James Smith also grants, bargains,
46 and sells, and hereby conveys, for the consideration aforesaid, to the said Chandler Lewis and Robert Day, all the land located, by virtue of New Madrid *a* certificate in favor of the said James Smith, or his legal representatives. And I, Sally Smith, *a* wife of James Smith, do also sell and assign all my right, title, and interest and dower*r*y to land, and all the land specified in the above deed of conveyance for the aforesaid specified sum. Furthermore, there is *know* warrantee in the above deed of conveyance except against Jame' Smith and his wife, Sally Smith, and their heirs.

Given under our hands the day and year above written. Interlined on line twenty-two, first page, word "number" before signed.

JAMES SMITH.
JAMES SMITH. [SEAL.]
her
SALLY + SMITH, [SEAL.]
mark.

Witness, present:
JOHN TINNIM.
GABRIEL LYTLE.

STATE OF MISSOURI,
County of Stoddard, ss:

Be it remembered, that on the eighteenth day of August, one thousand eight hundred and thirty-eight, Gabriel Lytle came before me, James Eaker, clerk of the circuit court of the said county of Stoddard, and State of Missouri, and produced to me the foregoing deed from James Smith, and Sally Smith, his wife, conveying to Chandler Lewis and Robert Day, land in Missouri, to which deed the said Gabriel Lytle is a subscribing witness, and offered to prove the same, and the said Gabriel Lytle, being personally known to me to be the person whose name is subscribed to said deed as a witness thereto; and thereupon the said Gabriel Lytle, being duly sworn, deposed and says that the said James Smith and Sally Smith, whose names are subscribed to the said deed, as parties thereto, are the persons who executed the same, and that the said Gabriel Lytle subscribed his name to said instrument as a witness thereof, all of which is certified, and also that the said circuit court
47 of Stoddard County, and State of Missouri, is a court of record.

Witnesseth James Eaker, clerk of the circuit court of Stoddard County and State of Missouri, under my hand and with the seal of said court annexeed the day and year first wri'ten.

In witness whereof I have hereunto set my hand and affixed my private seal, there being no public seal as yet priv'ed for, at office in Bloomfield August 18th, 1838.

[L. S.] JAMES EAKER, *Clerk.*

Filed for record August 27th, 1838. Recorded October 29th, 1838.
JOHN RULAND, *Recorder.*

STATE OF MISSOURI,
County of S't Louis, ss:

I, the undersigned, recorder in and for said county, certify that the foregoing is a true copy of an instrument in writing, executed by *John* Smith, together with the acknowledgment, date of filing and recording thereof, as the same remain on accord in my office in book F. 2, page 7.

Witness my hand and official seal, this 10th day of June, A. D. 1872.

[SEAL.] W. C. KENNETT, *Recorder.*

48

49 Here the evidence was closed on both sides, and no further evidence was given in the cause by either party. The court then instructed the jury of its own accord that upon the evidence offered, and under the proof by plaintiff that the survey on which the patent

issued was filed with the recorder within one year from the date of the act of 26th April, 1822, the patent issued to J. Smith in 1827, offered in evidence was a good and valid patent, and passed the title of the United States; and that if the jury believed from the evidence that the defendant had been in open, notorious, and continuous possession of the premises described in the declaration for ten years next before the commencement of this suit, claiming title under said patent, they should find a verdict for the defendant. To the giving of which said instructions to the jury, the plaintiff, by his counsel, objected, and instantly excepted in writing. Said objections being overruled by the court, the instructions were given to the jury, who thereupon rendered the following verdict.

(Copied on page 11 of this transcript.)

The stipulation and agreement with regard to taking this case to the Supreme Court of the United States was entered into and filed in this court 30 September, 1872.

The stipulation and agreement referred is as follows, to wit:

Stipulation.

GEORGE MACKAY, PLAINTIFF, } Stipulation.
versus
B. F. DAILY, DEFENDANT.

Suit pending in the United States circuit court for the eastern district of Missouri, being an action of ejectment for the recovery of a part of one hundred and sixty acres of land in the county of S't Louis, in the State of Missouri, founded on New Madrid certificate of relocation, No. 159, and designated as United States survey No. 2491.

This stipulation and agreement is this day made and entered into, by and between the counsel for the plaintiff and defendant in this suit, and to be entered of record in the said United States circuit court. *That is to say a suit.* That is to say a suit founded on the same title
for the recovery of a part of the same piece of land, wherein
50 George Mackay was plaintiff, and Alton R. Easton defendant,
was tried and determined in the United States circuit court, at the present September term of said court 1872, to wit, on the twenty-seventh day of September, 1872, wherein there was a verdict and judgment rendered in said cause for the defendant; which said cause so determined by and in favor of said Alton R. Easton is now being prepared to be taken by writ of error to the Supreme Court of the United States for final adjudication. It is therefore agreed by and between the parties to this suit, that this suit shall be continued without being subject to be called for trial, or incurring any further costs until after the final judgment and decree shall have been pronounced and entered up in the Supreme Court of the United States, in the case of George Mackay, against Alton R. Easton, as above stated; and that if the judgment and decree of this court shall be affirmed, or if the writ be dismissed, for want of prosecution, by the Supreme Court of the United States, in that case the same judgment as was rendered in the Easton case shall be immediately entered up in this case for the defendant by the United States circuit court for the eastern district of Missouri, without further trial or litigation; or if the plaintiff fail to prosecute his appeal or writ of error with due diligence, (of which judges of the

said circuit court shall determine,) then and in that case the like judgment as stated above shall be rendered in this case. And it is hereby expressly stipulated and 'greed further, by and between the plaintiff's counsel and the defendant's counsel, that in all the other suits now pending in the United States circuit court for the eastern district of Missouri, wherein George Mackay is plaintiff and other parties are defendants, for the recovery of any portion of the J. Smith New Madrid certificate of relocation No. 2491, are in controversy, (of which there are about one hundred and forty-five more suits,) now pending in ejectment, this same stipulation agreement shall apply to each and every case so pending in this court, as if each separate case had been named specially in this agreement. The writ of error and all the papers
51 necessary to take the case of George Mackay against Alton R. Easton to the Supreme Court of the United States to be prepared and filed with the clerk of the Supreme Court of the United States, without delay, in order that said case may be heard and determined as early as possible. In case the judgment of this case of Mackay versus Easton is reversed by the Supreme Court of the United States, all the suits now pending in this court, in favor of said Mackay, for the recovery of the same piece of property or any part thereof, will of course after that time be subject to be called for trial and heard in this court.

S't Louis, 30th September, 1872.

(Signed) JOHN F. DARBY, *Atto. for Pl'ff.*
(Signed) C. GIBSON, *P. D.*

The plaintiff immediately prepared and presented, this his bill of exceptions, to the presiding judge of the court, and prays that all the evidence and proceedings contained therein be made a part of the record in the cause, and it is accordingly done, and is signed and filed with the clerk.

(Signed) SAM. F. MILLER,
Presiding Judge.

52

53 UNITED STATES OF AMERICA,
Circuit Court for the Eastern District of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of George Mackay, plaintiff, against Alton R. Easton, defendant, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said district, this sixteenth day of November, in the year of our Lord eighteen hundred and seventy-two.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

(Endorsed:) United States circuit court, eastern district of Missouri. George Mackay against Alton R. Easton. Duly certified transcript of the record and proceedings in the above-entitled cause.

54 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1872, thereof, between George Mackay, plaintiff, and Alton R. Easton, defendant, *defendant*, a manifest error hath happened, to the great damage of said George Mackay, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Eastern District of Mo.

Allowed by: SAMUEL TREAT, *Judge.*

55 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the within writ, I herewith return a transcript of the record and proceedings of the within-entitled cause to the Supreme Court of the United States.

In witness whereof I hereunto subscribe my name, at office in the city of Saint Louis, in said district, this sixteenth day of November, A. D. 1872.

AUSTIN DRAKE,
Clerk of the Circuit Court of the United States,
for the Eastern District of Missouri.

(Indorsed:) United States circuit court eastern district of Missouri. George Mackay, plaintiff in error vs. Alton R. Easton, defendant in error. Writ of error to the circuit court of the United States for the eastern district of Missouri. Returned and filed, 187 . clerk.

56 The United States of America to Alton R. Easton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein George Mackay is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Samuel Treat, one of the judges of the circuit court of the United States for the eastern district of Missouri, this nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two.

SAMUEL TREAT,
One of the Judges United States Circuit Court,
Eastern District of Missouri.

57 I acknowledge due service of the within citation.

C. GIBSON,
Att'y for A. R. Easton.

St. Louis, *Nov'r* 21, 1872.

(Indorsed:) United States circuit court, eastern district of Missouri. George Mackay, pl'ff in error, vs. Alton R. Easton, def't in error. Citation. Filed , 187 . , clerk.

(Indorsement on cover:) No. 282. George Mackay, plaintiff in error, vs. Alton R. Easton. E. Missouri C. C. U. S. Filed 27th November, 1872.

O

IN THE

Supreme Court of the United States.

No 282

GEORGE MacKAY, *Plaintiff in error,*

VS.

ALTON R. EASTON.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

***JOHN F. DARBY** of St. Louis.*

Ahner, Menning & Co., Prs., 211 Market St.

IN THE

SUPREME COURT OF THE UNITED STATES.

George MacKay, *Plaintiff in error,*

vs.

Alton R. Easton.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

JOHN F. DARBY OF ST. LOUIS.

ASSIGNMENT OF ERRORS.

And now at this day comes here into Court the said George MacKay, plaintiff in error, and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error. The following errors are assigned by the plaintiff in error as committed by the Circuit Court of the United States on the trial of this cause in the Court below, as follows:

First—In not deciding the title to be in the plaintiff under the Act of Congress of the 30th of June 1864.

Second—In admitting as evidence on behalf of the defendant the patent issued by the United States, with the endorsement, that the same was delivered or sent to William Russell.

Third—In admitting as evidence the deed from *James Smith*, blacksmith of Cape Girardeau, to Rufus Easton, for lots number nine and ten in the village of Little Prairie, dated 22d October. 1816.

Fourth—In permitting the defendant to offer evidence as to the location of New Madrid certificate No. 159, in order to defeat the express grant by the Act of Congress of June 30, 1864, vesting the title to the land in question absolutely in the parties under whom the plaintiff claims.

Fifth—The Court erred in instructing the jury of its own motion upon the evidence offered and under proof by plaintiff that the survey on which the patent issued was filed with the recorder within one year from the date of the Act of the 26th April, 1822, the patent issued to J. Smith or his legal representatives 1827, offered in evidence was a good and valid patent, and passed the title of the United States; and that if the jury believed from the evidence that the defendant had been in open, notorious, and continuous possession of the premises described in the declaration for ten years next before the commencement of this suit, claiming title under said patent, they should find a verdict for the defendant.

JOHN F. DARBY,
Attorney for plaintiff in error.

There are also many other errors apparent upon the record which might be specifically pointed out as having been committed by the Court below in the trial of the cause.

STATEMENT OF THE CASE.

This was an action of ejectment, brought by the plaintiff to recover the piece of land specifically set forth and described in the petition and answer of the defendant, (see page 1 of printed record for the petition of the plaintiff, and pages 3 and 4 same record for answer of defendant.)

The piece of land sought to be recovered being a part of the tract, designated and known as New Madrid location, made under New Madrid certificate numbered one hundred and fifty-nine (159), issued to J. Smith by the recorder of land titles of the United States at St. Louis, Missouri, on the 16th day of November, 1815, and surveyed and known as United States survey (No. 2491) two thousand four hundred and ninety-one, in township 45 N., of range 7 E., being the same tract of land confirmed to the said J. Smith, or his legal representatives, by the Act of Congress entitled, "An Act concerning certain locations of lands in the State of Missouri," approved June 30th, 1864.

The title to the land in ~~question~~ Controversy was beyond all question, and admitted on all sides to be in the government of the United States, and it so remained till the 30th day of June, 1864, when it was vested in J. Smith, or his legal representatives, by the following Act:—

"CHAP. LXXXVI. An Act concerning certain lo-
"cations of lands in the State of Missouri, (June 30th,
"1864.) Be it enacted by the Senate and House of Re-
"presentatives of the United States of America, in
"Congress assembled: That all the right, title, and inter-
"est of the United States in and to all the lands with-
"in the respective boundaries of the following de-
"scribed locations in township forty-five, north of the
"base line, in range seven east, of the principal meri-
"dian line of the State of Missouri, made by virtue of
"certificates issued under the Act of Congress, ap-
"proved February the seventeenth, eighteen hundred
"and fifteen, entitled, "'An Act for the relief of the
"inhabitants of the late County of New Madrid, in the
"Missouri Territory, who suffered by earthquakes,'"
"shall be, and the same are hereby granted, relin-
"quished, and conveyed by the United States in fee
"simple and in full property, to the following men-
"tioned persons respectively, or their respective legal
"representatives, in whose names said locations were
'severally made, to-wit: Location under certificate

"number one hundred and sixty-one, being survey "number two thousand five hundred, in the name of "Joseph Hunot, or his legal representatives; location "under certificate number one hundred and fifty-nine, "being survey two thousand four hundred and ninety-"one, in the name of J. Smith, or his legal represent-"atives; location under certificate number one hundred "and forty-five, being survey number two thousand "four hundred and ninety-nine, in the name of Martin "Coontz, or his legal representatives; location un-"der certificate number nineteen, being survey number "two thousand six hundred and ninety-two, in the "name of Joseph Genereaux, or his legal represent-"atives; location under certificate number sixteen, "being survey number two thousand six hundred and "twenty, in the name of Francis Delisle, or his legal "representatives; and location under certificate num-"ber one hundred and sixty-four, being survey number "two thousand five hundred and forty-one, in the "name of John Brooks, or his legal representatives. "*Provided*, however, that nothing contained in the "foregoing provisions of this Act, shall, directly or "indirectly, comprehend, include, extend, to, grant, re-"linquish, or convey the whole or any part of any lot, "tract, piece, or parcel of land in said township, which "has heretofore been confirmed and surveyed by the "United States, to any person or persons, or to the "legal represeatatives of any person or persons. And "provided further, that nothing in this Act shall in "any manner abridge, divest, impair, injure, or pre-"judice any adverse right, title, or interest of any per-"son or persons in, or to any portion or part of the "aforesaid lots, tracts, pieces, or parcels of land which "are granted, relinquished, or conveyed by this Act." Approved June 30th, 1864.

Until the passage of the above Act, the title to the land mentioned and described in plaintiff's petition in this case, remained in the government of the United

States. By said Act the title to the land in question was passed to and vested absolutely in the said J. Smith, or his legal representatives. And the title of J. Smith, by admission on the record, (see record, page 16,) passed to and was vested in the plaintiff in this suit. The Act of Congress of February 17, 1815, under which the certificate issued and the location was made, are as follows:

"An Act for the relief of the inhabitants of the
"County of New Madrid, in the Missouri Territory,
"who suffered by earthquakes. *Be it enacted by the*
"*Senate and House of Representatives of the United*
"*States of America, in Congress assembled:* That any
"person owning lands in the County of New Madrid,
"in the Missouri Territory, with the extent the said
"county had on the tenth day of November, one thou-
"sand eight hundred and twelve, and whose lands
"have been materially injured by earthquakes, shall
"be, and they are hereby authorized to locate the like
"quantity of land on any of the public lands of the
"territory, the sale of which is authorized by law.
"*Provided*, that no person shall be permitted to locate
"a greater quantity of land under this Act, than the
"quantity confirmed to him, except the owners of lots
"of ground or tracts of land of less quantity of land
"not exceeding one hundred and sixty acres, who are
"hereby authorized to locate and obtain any quan-
"tity of land not exceeding one hundred and sixty
"acres, nor shall any person be entitled to locate
"more than six hundred and forty acres, nor shall any
"such location include any lead mine or salt spring.
"And provided also, that in every case where such
"location shall be made according to the provisions of
"this Act, the title of the person or persons to the land
"injured as aforesaid, shall revert to and become ab-
"solutely vested in the United States." (See United
Statutes at large, Vol. 3, page 11.)

The first section of the foregoing Act, as quoted, covers the whole ground. The second section points out the manner of making the location. It will be seen that "the holder of a New Madrid certificate had a right to locate it on" public lands which had been "authorized to be sold." But the location, as here made, was made on lands reserved from sale, and which had never been authorized to be sold,—and on that account the patent issued by the United States to Eustache Peltier, which covered the greater part of the identical same land now sued for in this case, was declared void. (See Stoddard et al. vs. Chambers, 2 Howard, 284.)

And the same doctrine and principle was again affirmed by the Supreme Court of the United States, in the case of Easton vs. Salisbury, (21 Howard, 426.) Where and in which case the very identical patent offered in evidence in this case by Easton, the defendant in this suit, was declared void, and an absolute nullity, because it had been issued for and located upon "public land," the sale of which was not "authorized by law," and which had been reserved from sale.

The Supreme Court of the United States, in the case of Stoddard et al. vs. Chambers, (2 Howard, page 317) says: "That the older legal title must prevail in an action of ejectment, is undoubted. But the enquiry here is, whether the defendant has any title, as against the plaintiff," [who claimed under the illegal and void patent, issued to Eustache Peltier, and which covered nearly all the land now sued for in this present suit.] The Court say: "And there seems to be no difficulty in answering the question, that he has not." His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." And again, same case, (2 Howard. pag · 318) the Court say: "No title can be held valid, which has been acquired against law: and such is the character of the defendant's title, so far as it trenches on the plaintiff. It has been argued that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. The fee having been vested in the patentee, by the first patent, the record would convey no right. It is true, a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law, it is void. Frauds vitiate all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void," &c.

To show how much of the ground now sued for in this case, (being survey No. 2491, certificate No. 159, surveyed for J. Smith, or his legal representatives, 160 acres of land, located by virtue of New Madrid certificate) is covered by the illegal and void patent, issued to Eustache Peltier, as decided by the Supreme Court of the United States, in the case of Stoddard et al. vs. Chambers, (2 Howard, page 284) we refer the Court to page 13 of the printed record in the case now before the Court. Again, in the case of Alton R. Easton, in error, vs. Thomas L. Salisbury, the Supreme Court of the United States expressly decided that the identical patent now set up in this case, by the defendant Alton R. Easton (the defendant in this suit, and who was the plaintiff in error in that case,) and claiming under the very same patent, was absolutely null and void; the decision being that the patent now again set up by Easton in this case, issued on the 28th May, 1827, "whilst the reservation was in force, was void." And the Court, in delivering the opinion in the case of

Easton vs. Salisbury, say (see 21 Howard, page 426): "But it seems by the Act of the 26th of April, 1822, it was provided that all warrants under the New Madrid Act of the 15th (17th) February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point." So that the location in this case was not in any respect "made in pursuance of the provisions of that act." (See Haile vs. Gains, 22 Howard's Reports, page 144.)

Every act and point, touching the validity of these New Madrid locations, and the law governing the same, were most amply and thoroughly examined and after having been fully investigated by able and distinguished counsel, decided by the Supreme Court of the United States in the cases of Stoddard et al. vs. Chambers (2 Howard, page 284,) Easton vs. Salisbury (21 Howard, page 426,) and Hale vs. Gains (22 Howard, page 144.) And the principles of law governing the title to the very same identical land now sued for, were passed upon and settled definitely by this Court in the two first cases now referred to, and the validity of the same New Madrid claim, adjudicated by these decisions. And it was admitted on the trial of the case, as shown by the record, page 16, in the Court below, that whatever title J. Smith, the original claimant and confirmee, had in lots nine and ten in the village of Little Prairie, in New Madrid County, had been conveyed by J. Smith to Andrew P. Gillispie, was vested in the plaintiff in this suit, before the commencement of the suit it is deemed unnecessary to enquire further into that question. It is proper to show, however, that the defendant Easton, and those under whom he claims title, never at any time had title to the land in this suit, and for this purpose we beg leave to refer to the title as evidenced by the record.

The Court will perceive from the record (page 11) that by the plat of the town of Little Prairie, New

Madrid County originally belonged to J. Smith, [see map marked at page 14]; that these lots nine and ten in the town of Little Prairie, in the County of New Madrid, were confirmed by the Board of Commissioners to J. Smith [not James Smith, for his name was in fact John, not James], on the 9th of July, 1811, under the provisions of the second section of an Act of Congress of the United States, entitled, "An Act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans, and the district of Louisiana," passed the 2d day of March, 1805, and certified by the United States Recorder of land titles, Stillman O. Fish; that J. Smith, the confirmee of these lots, executed a bond to Andrew P. Gillispie for the conveyance of these lots in Little Prairie to him, on the 14th day of April, 1816, which bond was duly acknowledged according to law, before George Tennille, a justice of the peace in the Territory of Missouri, and County of New Madrid, on the 29th day of April, 1816, and afterwards duly entered of record in the Recorder's office of New Madrid County.

This was the very first agreement to transfer said lots by J. Smith, the confirmee, to any person whatever. And in pursuance of said bond and obligation to transfer said lots, the said J. Smith did make a formal and full deed of conveyance for said lots in the village of Little Prairie, and County of New Madrid, to Andrew P. Gillispie, in due form of law, which said deed was duly acknowledged in proper form by said J. Smith before Enoch Evans, Clerk of the Circuit Court of New Madrid County, on the 5th day of March, 1819; and which said deed, so fully executed as to pass the title, was afterwards recorded in the proper county [see page 14 and 15 of the record]. It will be seen that the original grant was made to J. Smith, the bond and deed to Andrew P. Gillispie, for these same Little Prairie village lots, were made by J. Smith, the acknowledgment of the bond and deed of conveyance to Gillispie were made in the name of J. Smith: that J. Smith who lived in Little Prairie village in New Madrid County, and who was personally well known to Andrew P. Gillispie, who lived there too, and designated as being of Little Prairie in both the bond and deed. The justice who took the acknowledgment of the bond certifying that "personally appeared the above named J. Smith," and the Clerk of the Circuit Court of New Madrid County, Enoch Evans, making his certificate of acknowledgment to the deed thus:

"TERRITORY OF MISSOURI, } ss.
"COUNTY OF NEW MADRID, }

"I, Enoch Evans, Clerk of the Circuit Court for "the County of New Madrid, in the Southern Circuit "of the Territory of Missouri, do certify that J. Smith "appeared personally before me," &c.

There is no mistake, therefore, as to the identity of "J. Smith." At that early day the inhabitants were few, and the Clerk of the Circuit Court of the County of New Madrid knew personally and well every man in the county. The New Madrid certificate of relocation No. 159, dated St. Louis November 16, 1815, was issued by Recorder Bates to J. Smith, for one hundred and sixty acres of land in this case—Joseph C. Brown, deputy Surveyor of the United States, who made the survey in this case, says: "Survey No. 2491, certificate No. 159, surveyed for J. Smith, or his legal representatives, 160 acres of land, located by virtue of New Madrid certificate, T. 45 N., R. 7 E." The illegal and void patent, issued by the President of the United States, 28th May, 1827, on said survey No. 2491, was made in favor of J. Smith.

In the face of this clear, indisputable and unquestioned testimony and evidence, as to the identity of the real J. Smith, to whom the lots were granted and confirmed in the village of Little Prairie, and in whose favor the New Madrid certificate No. 159 was issued, and who is described in the bond and deed to Andrew P. Gillispie for said lots, as being there in the village of Little Prairie on the 14th of April, 1816, when he executed said bond, and who was known and recognized as living there up to March 5th, 1819, when the deed was given by him, in pursuance of the bond ~~was~~ given, the bond being witnessed by Robert Wallace and Upton C. Butler, and the deed by Jesse Pringle and H. Harbison, all well-known citizens and men of character, then living there in the village, since dead, and whose signatures were proven on the trial. The defendant sets up what the plaintiff contends, is a fraudulent and pretended deed, purporting to have been made by "J.ames Smith, blacksmith, and Sarah, his wife, both of the County of Cape Girardeau, in the Territory of Missouri," dated the 22d day of October, 1816, for this same property, to Rufus Easton, six months after the date of the bond given by the genuine J. Smith, of the village of Little Prairie, to Andrew P. Gillispie, for the land so confirmed to him in the village of Little Prairie, which deed is dated the 5th of March, 1819, from said J. Smith who still lived in the village of Little Prairie, nearly five months after James Smith, blacksmith, of Cape Girardeau, had made a deed to Rufus Easton for this same land.

There is no evidence whatever to prove, or tending to prove, that "James Smith, blacksmith," of Cape Girardeau, ever lived in the village of Little Prairie, or even in the County of New Madrid, or that he ever owned any land there. It is but a shallow and flimsy pretense to fraudulently personate the real J. Smith.

The deed itself is evidence of this fact, wherein it speaks "of one arpent, originally granted to the said James Smith by Don Henry Peyroux, on the 24th of

September, 1806, as by concession of that date, and confirmed to him, said James Smith, under the laws of Congress, by the recorder of land titles for said Territory." This statement in the deed sets up the absurd and ridiculous position that Don Henry Peyroux, a Spanish officer, could make a concession of land on the 24th day of September, 1806 in the Territory of Louisiana, years after the United States had acquired the country by treaty, and was in the peaceable possession thereof, in the full jurisdiction and exercise of all the functions of government therein. It will be seen from the record also, that the pretended deed purporting to have been made by the said James Smith, and read in evidence by the defendant on the trial of this cause from a certified copy from the recorder's office, and not the original deed, so purporting to have been executed by him. And that by said deed James Smith shows to have written his name himself in full, and that his wife Sarah Smith, who joined him in said pretended deed, seems to have been unable to write, and merely made her mark. And that both the deed and bond read in evidence by the plaintiff, to Andrew P. Gillispie, executed by the real J. Smith, of the village of Little Prairie, were each of them original papers executed by the said J. Smith, making his mark, being unable to write his name. And this was done by him in the village of Little Prairie, where he is stated and represented in both instruments, as living and having his home, where the land intended to be conveyed is situate, and where he was personally well known to the vendee as well as to the officers who took the acknowledgments of the instrument in writing touching the land to be conveyed, as also to the living witnesses to these instruments, at that time residents of said village of Little Prairie, where all the inhabitants knew each other well. Nor was there any evidence whatever, to show that the genuine J. Smith of

case now before the Court, because it was not located on land "the sale of which is (was) authorized by law." (See U. S. Statutes at large, vol. 3, page 211.)

In order to ascertain what lands were then authorized by law, (17th February, 1815, date of the New Madrid act) we must look to the Act of the 3rd March, 1811, providing for the final adjustment o claims to land &c., "the 10th section of which describes the lands, which the President was authorized to sell," and by the proviso to which section it is expressly declared till the decision of Congress therein, no tract of land shall be offered for sale the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office for the purpose of being investigated by the commissioners, appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana. (See U. S. Statutes at large vol. 2, page 665, section 10. of said Act.)

It is deemed unnecessary to draw the attention of the Court to the fact of general history, as well, as matter of law, that by the Act of June 4th, 1812, a part of this same Territory of Louisiana, was created into the Territory of Missouri. (See 2 vol. U. S. Statutes at large, page 743.)

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The court in the trial of the case below, greatly erred in permitting said deed of James Smith and wife to Rufus Easton, to be read in evidence on the trial of the cause, and against the objections of the plaintiff's counsel. The defendant also offered in evidence "an act to perfect certain locations and sales of public lands in Missouri." Approved April 26, 1822, which is as follows: Be it enacted by the Senate and House of Representatives, of the United States of America, in Congress assembled, that the locations heretofore made of warrants issued under the Act of the fifteenth of February, one thousand eight hundred and fifteen, entitled, "An Act for the relief of the inhabitants of the late County of New Madrid, in the Missouri Territory, who suffered by earthquakes," if made in pursuance of the provisions of that Act, in other repects, shall be perfected into grants in like manner, as if they had conformed to sectional or quarter sectional lines of the public surveys, and the sales of fraction~~al~~s of the public lands, heretofore created by such locations, shall be as valid and binding on the United States, as if such fraction~~al~~s had been made by rivers and other natural obstructions. In the first place there is no such Act of Congress, as that referred to, in the above section, as providing for "locations heretofore made of warrants issued under the act of the fifteenth of February, one thousand eight hundred and fifteen "The act for the relief of the inhabitants of the late County of New Madrid, in the Missouri Territory, who suffered by earthquakes," was passed and approved on the Seventeenth of February, 1815, and not on the Fifteenth of February, 1815. (See United States Statutes at large, vol. 3. page 221.

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[became]

In addition to the above, we refer to the letter of the Commissioner of the General Land office, George Graham, of the 15th September, 1823, to Wm. Christy, Register of the Land office at St. Louis; transmitting an extract of a letter from Mr. Crawford, then Secretary of the Treasury, dated 15th September, 1823. Showing that the identical lands, a part of which is the subject matter of investigation in this case, now before the Court, had been in fact and by law expressly reserved from sale, and was fully exempt from the location of any New Madrid certificate, because not being at any time "public lands," the sale of which is (was) authorized by law." (See record, page 23.)

It is clear beyond a doubt, that the land in controversy was not at any time subject to a New Madrid location. And it was upon this express ground, that the Supreme Court of the United States, decided in the case of Stoddard et al. vs. Chambers, (2nd Howard page 284) that the patent issued to Eustache Peltier, under a New Madrid location, which covered the greater part of the identical piece of land covered by the survey in this suit, and on the very same quarter section, was absolutely null and void. No title could pass by it.

The land which had been thus reserved from sale, was not only that portion of the land, which was afterwards confirmed by the United States, to Mordecai Bell, as a Spanish grant; but the whole township, sections or quarter sections with which the unconfirmed French and Spanish grants interfered.

These the United States were bound by treaty, the supreme law of the land, to confirm. And until after such confirmation, and a survey ordered and made by the government, of the claims thus confirmed, there was no telling, where the lines would run, or how much of the reserved lands would be thus appropriated, in satisfaction of the claims thus confirmed, and marked out by regular surveys and designated by metes and bounds, in fulfilment of the solemn faith and pledge of the United States Goverment, to have that done. From reason and necessity as well as law, a sufficient quantity was reserved to satisfy these calls which included the whole township, being the French and Spanish claims, which "had been in due time and according to law presented to the recorder of land titles."

The defendant, however, assumes to claim title to the premises in controversy, under the patent issued to J. Smith by the President of the United States, on the twenty-eighth day of May, one thousand eight hundred and twenty-seven, and delivered to William Russel, St. Louis, 31st May, 1827. And also by the Act of Congress of April 26th, 1822. The correctness of this claim, we shall proceed to examine. (See vol. 3, U. S. Statutes at large, page 668.)

We have shown before in this argument, that the defendant in this suit did not derive any right whatever from J. Smith, the patentee named in the patent of 28th May, 1827. And from the evidence on this point, as we contend, whatever title to the lots in the village of Little Prairie, were in J. Smith, who could not write his name, passed into and vested in the plaintiff in this suit, who was altogether a different person to "James Smith, the blacksmith of Cape Girardeau," who could and did write his name, as shown by the deeds. But this identical patent, now set up in this suit, has been solemnly adjudged absolutely null and void by the Supreme Court of the United States in the case of Easton vs. Salisbury. (21 Howard, page 426.)

The case was most ably presented and argued by distinguished counsel, and examined with great labor and deep investigation by the Court, and such was the unanimous decision of the whole Court, without a dissenting word, from either of the Judges.

The opinion of the Court being so full and clear, we beg leave to quote from the same, as follows: "It will be observed, that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate, had a right to locate it on any of the public lands, which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and on the 28th May, 1827, the United States issued a patent to James Smith or his legal representatives." (The learned Judge, who delivered the opinion in that case, made a mistake in saying, the patent was issued to James Smith, as the Court will perceive on, referring to the patent in the record, page 17, the patent was issued to J. Smith, whose name was John, not James.) From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that time they ceased, until renewed by the Act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question, was subject to be disposed of to any person, or in any manner, and was then open to entry or location."

And it is urged that the plaintiff had the right, during this time to perfect his title. The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of Stoddard vs. Chambers (2 Howard, 318) it is said: "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was reserved by the Act of 1832, the title of the defendant could not be contested."

"Nothing was done to give Easton's title validity, from the cessation of the reservation in 1829, until its revival in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might not have been procured, or a new one instituted, it is not necessary to enquire! No such attempt was made."

"But it seems by the Act of the 26th of April, 1822, it was provided that warrants under the New Madrid Act of the 15th of February, 1815" [there was no such Act—it was the 17th of February, 1815] "which shall not be so located within one year, shall be held null and void. This law is decisive upon this point; all New Madrid warrants, not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the Act of the 4th of July, 1836. Bell made the conveyance to ~~[illegible]~~ Stoddard, not having the legal title, but when under the Act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured by way of estoppel to the grantees and those who claim by deed under him."

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The location was not only voidable, but was absolutely void, as it was made on land subject to a prior right. And under the Act of April 26, 1822, all New Madrid warrants, not located within a year from that date were declared to be void." This is the language and decision of the Supreme Court of the United States, which covers the whole ground, and adjudicates the patent under which the defendant claims title to be absolutely void, under any and every aspect of the case that can be presented. As well as under the Act of Congress of the 26th of April, 1822, as under all other Acts of Congress and judicial decisions touching these New Madrid locations. A patent cannot be good in part and bad in part, and these New Madrid patents, for the land sued for having been decided void and a nullity by the Supreme Court, no right could of course pass under them. The very same Easton referred to, and the identical same patent, so ably and so thoroughly examined into, the authority to issue the
Said patent in that case of Easton vs. Salisbury, ~~are~~ is the very same Easton now defendant in this suit, and the
identical patent and land referred to therein the same as in this case. Even to go back to the old English authorities, (which is hardly necessary, because the Supreme Court of the United States has decided that the President could not issue a patent without authority of law.) we are told: "Where the king's patent creates a new estate, of which the law doth not take knowledge, the patents are void."

The Supreme Court of the State of Missouri in the case of Easton vs. Salisbury, decided against the validity of the patent dated the 28th May, 1827, on precisely the same grounds, as those decided by the Supreme Court of the United States, that case having been taken by writ of error from the Supreme Court of Missouri to the Supreme Court of the United States. (See Evans vs. Salisbury, 23d vol. Missouri Reports, page 100.) In deciding that case, Judge Scott of the Supreme Court of Missouri said: "In a certificate of title between a New Madrid location and a confirmation under the Act of July 4th, 1836, as an original question, the inclination of the judgment of this Court is well known. But the cases of Stoddard vs. Chambers, (2 Howard, 284,) Mills vs. Stoddard, (8 Howard, 345,) and Bissell vs. Penrose, (8 Howard, 317,) in the Supreme Court of the United States, in our opinion settled the question," &c. And again, the learned Judge in the same decision says: "The cases to which reference has been made, show that any location of the land, made by an officer of the government whilst it was reserved from sale, was purely void; not voidable, but void. Now, a void act, when done, is as though it had not been done. Consequently the patent dated the 28th May, 1827, was a nullity. It was a blank, and could confer no right whatever. The plaintiff then can stand on no better ground that the defendant occupied in the case of Penrose vs. Bissell. If the President of the United States should issue patents for lands, where a sale is not authorized by law, and afterwards those lands should be brought into market, on what principle could the patents issued, at the time when there was no authority for so doing, be held to be valid, for passing title to the lands described in them?"

The learned Judge, in that same opinion, says further: "The reservation of the unconfirmed Spanish land claims was made by section 10, of the Act of March 3d, 1811. The reservation continued in force, without interruption, until May 26th, 1820, when it expired. Now, the patent on New Madrid certificate, issued on the 28th of May, 1827, whilst the land which it covered, was by Act of Congress, reserved from sale."

These very sentiments, and this very doctrine, as declared by the Supreme Court of the State of Missouri, in the opinion now here cited, were affirmed by the Supreme Court of the United States in that same case, by the unanimous opinion and judgment of the whole Court.

It cannot but strike the mind of the Court, as somewhat remarkable that the defendant should have offered in evidence, on the trial of the cause in the Circuit Court, the Act of Congress of the 26th of April, 1822, (see page 20 of the record,) to establish the validity and legality of the patent issued to J. Smith, or his legal representatives, under whom the defendant assumes to claim title, when the Supreme Court of the United States had already expressly decided the location and patent issued thereon "null and void" in Easton vs. Salisbury. (21 Howard, page 431.) The language of the Court is clear and conclusive in these words: "But it seems, by the Act of the 26th of April, 1822, it was provided, that all warrants under the New Madrid Act of 15th [17th] of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point, all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramoant claim of Bell, whose title was confirmed by the Act of the 4th July, 1836. Bell made the conveyance to ~~Mackay~~ Stoddard, not having the legal title, but when under the Act of 1836 the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured by way of estoppel to the grantee, and those who claim by deed under him, (Stoddard vs. Chambers, 2 Howard, 317.)

Again, the testimony of William H. Cozzens, a witness called by the defendant, is so full and ample as to the location of the land in controversy, we beg leave to state it, (see printed record, page 20.)

Witness being cross-examined by the plaintiff's counsel, said: “That he knew this United States survey No. 2491, made on New Madrid certificate No. 159, by heart, that it was not located upon sectional or quarter sectional lines, but it lies north and south; it does not coincide with sectional lines anywhere; he, witness, began surveying in this county in the year 1835. The survey in this case did not coincide with sectional or quarter sectional lines anywhere.” At page 21 of the printed record in this case is the following statement: “Here it was admitted by both parties that the survey No. 2491 was returned to the recorder February 23d, 1823.” And further, the witness [E. H. Hesse] proceeded to state: “The first sectional line was run between 33 and 34, and then there are a number of others at the bottom of the page, the date appears April 30, 1818. The survey of township forty five was returned to the surveyor general, that is, the plat is dated December 11, 1824; said, there was no evidence he knew of in the book, that the first plat was made before that date, (see the full printed record in this case, page 21.) The Supreme Court of the United States in the case of Bagnell vs. [illegible] t cided that “the United States never dee [illegible] s appropriated until the survey was retu [illegible] proved by the surveyor general, &c., (see 13 Peters, page 448). The only evidence of the location was the plat and certificate of the surveyor. So again, the return by the surveyor with a notice of location to the recorder; was the first appropriation of the land, and not the notice to the surveyor general's office, requesting the survey to be made, (see Gamble vs. Barry, 3 Howard, page 51.)

These very sentiments, and this very doctrine, as declared by the Supreme Court of the State of Missouri, in the opinion now here cited, were affirmed by the Supreme Court of the United States in that same case, by the unanimous opinion and judgment of the whole Court.

It cannot but strike the mind of the Court, as somewhat remarkable that the defendant should have offered in evidence, on the trial of the cause in the Circuit Court, the Act of Congress of the 26th of April, 1822, (see page 20 of the record,) to establish the validity and legality of the patent issued to J. Smith, or his legal representatives, under whom the defendant assumes to claim title, when the Supreme Court of the United States had already expressly decided the location and patent issued thereon "null and void" in Easton vs. Salisbury. (21 Howard, page 431.) The language of the Court is clear and conclusive in these words: "But it seems, by the Act of the 26th of April, 1822, it was provided, that all warrants under the New Madrid Act of 15th [17th] of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point, all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the Act of the 4th July, 1836. Bell made the conveyance to ~~[illegible]~~ Stoddard, not having the legal title, but when under the Act of 1836 the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured by way of estoppel to the grantee, and those who claim by deed under him, (Stoddard vs. Chambers, 2 Howard, 317.)

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The evidence from the record shows conclusively and beyond any question whatever, that the survey No. 2491 was returned to the recorder February 23d, 1823." The second section of the Act of Congress of the 26th of April, 1822, expressly enacted, "That hereafter the holders and locators of such warrants shall be bound in locating them, to conform to the sectional or quarter sectional lines of the public surveys as nearly as the respective quantities of warrants will admit; and all such warrants shall be located within one year after the passage of this Act; in default whereof the same shall be null and void."

The location of the survey in this case No. 2491, shows that the same was located February 23d, 1823, being within one year after the passage of the Act of the 26th April, 1822, but was not made to conform to the sectional or quarter sectional lines of the public surveys, as required by the second section of said Act, but in direct violation of the positive enactment thereof, as shown by the evidence, and consequently in the language of the second section of the Act itself was "null and void," as is declared by the Supreme Court in Easton vs. Salisbury, (21 Howard, page 431,) above referred to.

How could any title pass therefore, by a location and patent so repeatedly declared null and void by the Supreme Court of the United States, in the decisions to which we have referred?

In the case of Gamble vs. Barry, decided at the January term, 1845, of the Supreme Court of the United States, on writ of error, to the Supreme Court of Missouri, (see 3 Howard, page 32,) the Court held that New Madrid locations might be made on public lands, without regard to sectional or quarter sectional lines, if made prior to the passage of the Act of Congress of the 26th of April, 1822, as provided for in that Act. This decision was made in conformity to, and in accordance with, the decision and doctrine laid down in the case of Stoddard vs. Chambers. For the Court say in this case: "Had the entry been made, or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832, the title of the defendant could not be contested." (See 3 Howard, page 54.)

In that case the claimant to the land, James MacKay, was barred because he failed to give notice of his claim, and file his title papers, as required by the Act of March 20, 1805, section 4, which expressly enacts: "And if such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this Act, shall become void, and forever thereafter be barred, nor shall any incomplete grant, warrant order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence in any Court of the United States, against any grant derived from the United States." The claim in the case referred to for the reasons stated, having been barred by the Acts of Congress of 1805, 1806 and 1807, as decided by the Court, it may perhaps be deemed unnecessary to refer to the decision as having any bearing on the present case. For in Easton vs. Salisbury, (21 Howard, page 426,) decided by this Court at the December term 1858, thirteen years after, when the whole subject of the laws and decisions relating to these New Madrid locations, were again being thoroughly examined by the Court, no reference or allusion is made by the Court to the case of Gamble vs. Barry, evidencing thereby that the Court did not consider any of the points decided in that case, as bearing upon the case, then under judicial investigation. One observation, however, is worthy of remark, in relation to that case, that is, in Gamble vs. Barry. The decision was made by a bare majority of the Court, and in which Justices McKinley, Story and Wayne joined in a dissenting opinion. That was for land in township 45 north, range 6 east, the township west of the one in which the land is located, about which the controversy is in the case before the Court. except a trifling fraction

The Supreme Court of the United States by the decision in Easton vs. Salisbury re affirming by the unanimous opinion of the whole Court the decision and doctrine, made 18 years before that time by a like unanimous opinion in the case of Stoddard vs. Chambers, by which the whole subject of these New Madrid locations was so amply and fully examined by the Court. Decisions under which property and rights have been acquired, and acquiesced in as the ascertained and well settled law of the land, by the highest judicial tribunal of the nation for a period of more than thirty years.

Township 45 range 7 east, is, as the Court will perceive on reference to the map, a mere fractional township, made so by the bend in the Mississippi River, in which the ancient Frenchtown, now the prosperous and great city of the Mississippi Valley, St. Louis, is situated. By reason of this fact, all the land in this township, adjacent to the old French capital of upper Louisiana, had been covered by grants, made by the French and Spanish authorities before the cession of the country. The land thus covered by these grants, notice of which had been filed with the recorder of land titles, as required by law, was reserved from sale, in order to satisfy the unconfirmed claims, in fulfilment of the solemn pledge of the government of the United States, that they should be protected in the free enjoyment of their "liberty, property and the religion which they profess." For a moment, I hope, the Court will indulge and pardon my allusion to a few historical facts, connected with the property, which is the subject of judicial investigation now under consideration, as throwing some light upon the subject. "The inhabitants of the ceded Territory" had been "incorporated in the union of the United States," without their knowledge, authority, or consent, and put under the dominion and authority of a people, with whose language, religion, government, society, and notions of life and social intercourse they were not acquainted, and against a race towards whom they had cherished strong prejudice, from the day of the fall of Quebec, purchased so dearly by the blood of the gallant Wolff. And rather than remain under the jurisdiction or the nationality of their conquerors, of the British or English stock, many of them had fled from the Canadas to the west bank of the Mississippi. And when governor Don Carlos Dehault Delassus at the time of the actual transfer of the country took place on Main Street, in the town of St. Louis, ordered the old flag hauled down, and the American flag hoisted up in the presence of all the inhabitants, as emblematic of the sovereignty of the country, such was the aversion of the people to the transfer, that they shed tears on the occasion, and refused to cheer the new flag. To satisfy, to conciliate, to win over and attach the dissatisfied population to this new condition of things, seemed the policy of the government.

Mr. Jefferson himself, as the first step in that direction, having immideately appointed the sons of four of the most influential families in the Territory, cadets to West Point, as a link in the bound of attachment. The legislation of Congress was so shaped, as to assure "the inhabitants." that they should have their land confirmed; hence they were protected and their land reserved from sale by special acts of Congress. Political preferment was obtained, by the assurances of support given by parties to the confirmation of these claims, where they had complied with the law, in filing notices with the recorder of land titles. By these means it was, that Col. Benton first reached the floor of the American Senate, where he afterwards served, to use his own language, six 'Roman lustrums.'

There never was at any time, since the date of the treaty, any public lands in township 45, range 7 east, the sale of which was authorized by law, on which a New Madrid location could be made.

On the 13th of June, 1823, the President of the United States issued a proclamation, directing the public lands in township 45 north, range No. 6 and 7 east (among others a large number of lands) to be sold on the third Monday of the ensuing October. The land in this case is situated in township 45 N., range 7 E. And, although the proclamation was issued by the President, directing the public sale thereof, no such sale, in range 7, east of that township, ever was in fact offered for sale. For under instructions of George Graham, commissioner of the general Land office, under date of the 15th September, 1823, to William Christy, register of the Land office, at St. Louis, and the extract from the letter of the secretary of the treasury, of the same date, these lands were expressly withheld from sale, (see the record of this case, page 23,) in which the commissioner of the general Land office, says to Mr. Christy, register on this subject: "As your sale will commence on the
" 3rd Monday of October, I have thought proper for the
" present, to instruct you to withhold from sale all frac-
" tions, which may be caused by the unconfirmed private
" claims. If these claims should not be confirmed, the
" fractions will disappear. If they should be confirmed,
" the lands will then sell for a better price than at the
" present time. I have thought it proper, on account of
" the pressure as to time, to give you an extract from
" my letter to Mr. Crawford," (secretary of the treasury.)
" The land in this case, moreover shows, that it is within

the township in which is the town of St. Louis, and the Supreme Court of the United States has expressly decided in the case of the Public Schools vs. Walker, (9 Wallace, page 282,) that there was no public land in said township subject to sale. It is clear then beyond a doubt, that there was no public land in said township, the sale of which was authorized by law, on which the New Madrid location was made in the case in the name of J. Smith, could at that time be legally located, and that the same, and the patent issued in pursuance thereof, were and are absolutely null and void.

In consequence of these decisions of the Supreme Court of the United States, made in the case of Stoddard vs. Chambers, (2nd Howard, page 284,) Easton vs. Salisbury, (21 Howard, page 426,) Mills vs. Stoddard (8 Howard, page 364) and Bissell vs. Penrose, declaring these New Madrid locations and the patents issued theron, null and void, it was, that the Act of Congress of the 30th June, 1864, passed, vesting the title to the land in controversy to J. Smith or his legal representatives. Up to that time, the title to the fractions of land, made by the confirmations of the French and Spanish grants, in township 45, N range 7 E., remained in the United States. The whole lands within the State of Missouri, whether founded on French or Spanish grants, New Madrid locatio
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We might almost contend, that the subject matter, of the land in controversy in this case, was *res adjudicata*, wherein the same land, the same patent and the same party, defendant in this suit's claim to title had been so fully examined and passed upon. These decisions of the Supreme Court, declaring the patent in the cases cited null and void, have been, for a period of nearly forty years, acquiesced in, as the settled law of the nation. This as the settled law of the Country, has been hallowed by time, and sanctified by years. Of all the elements of civil government, the permanency of the rule by which private property is held, has ever been considered as amongst the most sacred and inviolable. All the judges on the bench, when these decisions were made, have passed off, down the stream of time, having shared the common lot of humanity. But the well defined lines and land marks, by which the law, governing private rights and property, as held under these New Madrid locations, have been laid down by them, with such distinguished ability, still remain as lasting and proud monuments of their learning; and as an evidence of the manner, in which they administered the co-ordinate branch of the government, committed to their charge.

The plaintiff deems it unnecessary, to present any further argument to sustain his right, to recover the land, sued tor in this case. We hold:

First—That the land, upon which the New Madrid location was made in this case, was not at the time public land, the sale of which was authorized by law.

Second—That said location and patent issued thereon, were utterly null and void, and passed no title by said void patent.

Third—That the title to the fractions of land, in township 45, range 7 east, which remained after the Spanish grants were confirmed, was in the United States up to the 30th June, 1864, when, by the Act of Congress of that date, the locations and surveys were made valid, and the title of the United States to the land in this suit, vested, by said Act, absolutely in J. Smith or his legal representatives.

Fourth—That no Statute of limitation up to the 30th June, 1864, when the United States, by said Act of Congress, parted with the title, could run against the government.

. It was admitted, (see record, page 16,) that the property in dispute in this case, was of the value of five thousand dollars, and that the monthly rents and profits thereof, were of the value of fifty dollars. As all the facts appear upon the record, and no new facts to be enquired into, on a trial of the case again in the Circuit Court, the plaintiff prays the Court to reverse the erroneous decision, so rendered by the Circuit Court, and to render such final judgment, in this case in favor of the plaintiff, as the Circuit Court should have done.

JOHN F. DARBY,

Counsel for plaintiff in error.

The Supreme Court of the United States.

No. 282.

OCTOBER TERM, 1873.

GEORGE MACKAY, PLAINTIFF IN ERROR,

vs.

ALTON R. EASTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT OF BRITTON A. HILL, OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT.—Both parties claim the land in suit, under the same New Madrid survey of 1818, location of the 26th of February, 1823, patent thereon of 1827 and Act of Congress of 30th June, 1864, to J. Smith, or his legal representatives.

Plaintiff claims under J. Smith, a farmer of Little Prairie, in New Madrid County, the true owner, and defendant claims under James Smith, a blacksmith, of Cape Girardeau, a stranger to the title.

The Court below held, that plaintiff's claim was barred by a possession of ten years, and that the New Madrid patent of 1827 vested the title of the United States in J. Smith, so that the question of the derivative title was unimportant. It was admitted in this suit that plaintiff held it. Rec., p. 16.

POINT 1st.—Plaintiff Mackay insists that the New Madrid survey of 1818 and location of 1823, resulting in a patent in 1827, were and are void, and that the title to the land sued for remained in the United States until the 30th June, 1864, when it was granted to J. Smith, or his legal representatives, by Act of Congress of that date, and that the statute of limitations was no defence to this action.

In the case of *Easton* vs. *Salisbury*, 21 Howard, 428-9, on this same title under the New Madrid patent of 28th May, 1827, to J. Smith, or *leg. reps*, in a controversy, by the present defendant Easton claiming under the patent of 1827; with one Salisbury, claiming under a confirmation to Mordecai Bell, by Act of Congress of 4th of July, 1836, this Court held that the lands included within the New Madrid patent of 1827 to J. Smith, were reserved from sale and the patent void *ab initio*. 21 How., 430, 1-2.

Mr. Easton insisted he had the right to recover against Salisbury on the ground that the location might be valid against the United States. *Id.*, 21 H., 427. This view was considered by this Court and the rule established in *Stoddard* vs. *Chambers*, 2 How., 318, was applied to the patent of the United States to J. Smith of 1827, (21 How., 427-8) whereby it was declared void.

The land sued for is within the village of St. Louis, as established by Act of Congress of 13th June, 1812. *Guitard* vs. *Stoddard*, 16 How., 508. *Glasgow and Taylor* vs. *Hortez*, 1 Black, 595.

St. Louis, a Spanish village, ceded by France to the United States in 1803, had common field lots belonging to the villagers, known as the St. Louis common field lots, the Grand Prairie common field lots, the Cul-de-sac common field lots, and the Barrian des Noyers common field lots, and the commons of the village. See township map of St. Louis township in the General Land Office of 1845 and 1855. The village included the village lots, out-lots, common field lots, and commons in, adjoining and belonging to the village of St. Louis in 1803, and all vacant spaces between them, and an outboundary line was to be run by the Act of 1812, so as to include all these dependencies. The villagers were confirmed in their titles and possessions within that outboundary, which necessarily included the land sued for. All the land within one outboundary line, so run as to include all these field lots and commons belonging to the village, was either granted to the inhabitants of the village or reserved for the use of schools by the Act of 1812.

The land sued for lies between the Grand Prairie common field lots and the St. Louis Prairie common field lots (see Survey in Rec., pp. 21, 22; and township plat in General Land Office); and is within the outboundary line established by the Act of 1812. *Glasgow & Taylor* vs. *Hortez*, 1 Black, 595. The failure of the

U. S. Surveyor to run the true outboundary for St. Louis did not affect the claims of the villagers to their field lots, out-lots, or commons. *Id.*

All the lands within such an outboundary were reserved from sale by Acts of Congress "from 1808 to the 26th May, 1829." 21 How., 430. *Stoddard* vs. *Chambers*, 2 How., 285. *Guitard* vs. *Stoddard*, 16 How., 508. This reservation was, in the nature of the case, of all the lands belonging to the village, and such lands were not subject to sale or entry. The two cases of *Kissell* vs. *The Schools*, 18 How., 25, and *Glasgow & Taylor* vs. *Hortez*, 1 Black, 595, prove the proposition that all lands and lots within the outboundary of St. Louis so run as to include the whole of the out lots, field lots, village lots, and commons, were either granted or reserved, and could not be subject to sale, entry, or location under the New Madrid Acts.

The reservations of all these lands and lots, to satisfy the claims of St. Louis villagers, as they existed in Spanish times, continued *ex necessitate rei* until the 26th May, 1829, and all entries, sales, or new locations prior to that date were void. There was no period of time, from 1808 to this day, when a New Madrid location could be made, except for three years, between 1829 and 1832. All New Madrid locations prior or subsequent to these three years, on lands within the true outboundary of the lots and commons of St. Louis, were prohibited by law, and all patents issued thereon were void. This is the only reasonable construction that can be given to the cases of *Stoddard* vs. *Chambers*, 2 How., 285; *Stoddard* vs. *Mills*, 8 How., 345; *Bissell* vs. *Penrose*, *id.* 317; *Easton* vs. *Salisbury*, 21 How., 430; *Guitard* vs. *Stoddard*, 16 How. 508; *Kissell* vs. *The Schools*, 18 How., 25; *Glasgow & Taylor* vs. *Hortez*, 1 Black, 595; and *Public Schools* vs. *Walker*, 9 Wall, 282. Any other construction would unsettle titles in St. Louis Township to more than twenty million dollars of property.

The Court below was misled by supposing there could be a valid N. M. location within St. Louis village prior to May, 1829. That was not possible under the Acts of Congress, and this case should not be confounded with those where sales or locations of New Madrid certificates were made outside of Spanish villages their common field lots, out lots, and commons. *Menard's Heirs* vs. *Massey*, 8 How., 293, was a case of sales and patents in 1826 of lands in the country claimed to be within a confirmation to Cerre of 1836, on a grant of 1799, which had no specific boundaries, and the Spanish claim was held not to have been reserved from sale or entry, and the patents valid. 8 How., 313, 314, 309. But the power of the reservations by the Acts of 1807 to 1829 to preclude sales, entries or locations is reaffirmed, whenever the reserved lands have a specific boundary. There could not be a more specific boundary than the one created by the Act of 1812 for the village of St. Louis. The different tiers of the common field lots of St. Louis were most of them surveyed by Spanish surveyors as early as 1770–2, and marked with corner stones. *Glasgow & Taylor* vs. *Lindell's Heirs*, 50 Mo. Rep., p. 68–9, 1872.

The first series of common field lots in St. Louis touched the stockade fortifications along Third and Fourth Streets, and extended two and a half miles north of the Court House; the second series of common field lots was on the west of the first series (*Guitard* vs. *Stoddard*, 16 How.); the third series was the last, known as the Grand Prairie common field lots. The north boundary lines of the first and third series are nearly identical, and each of the lots in them were forty arpents long. South of the series of the Grand Prairie common field lots, came the Cul-de-sac common field lots and the Barriere des Noyers common field lots, and east of them the St. Louis commons. The old village of St. Louis in 1812 embraced all these dependencies as part of the village, fronting six miles on the River Mississippi by a depth of four miles on the north and three miles on the south, bounded east by the river. These field lots, out lots, village lots and commons formed the Spanish village. By the Act of 13th June, 1812, the old Spanish village of St. Louis was bounded—north, by the most northern lots of the St. Louis common field and Grand Prairie common field; west, by the line connecting the Grand Prairie, Cul-de-Sac and Barriere des Noyers common field lots, and south by the common field lots and commons of Carondelet (*Mackey* vs. *Dillon*, 4 Howard), and contained all the land within that outboundary, which the U. S. Surveyor was directed to run by the 1st Section of the Act of Congress of 13th of June, 1812, and this Court has held that the failure to run it did not affect the claims or titles of the villagers. The township plats of 1824, 1845 and 1855 show the extent and outboundary lines of the Spanish village of St. Louis, as established by the U. S. Surveys made for said village under the said act of 1812; which in most cases were only a retracing of the old Spanish surveys made between 1770 and 1804. No public lands could exist within the boundaries of this village, and no New Madrid location could be made therein prior to 1829.

The J. Smith N. M. location was made on land lying between the St. Louis common field lots and the Grand Prairie common field lots, about the centre of the north half of the village lots, in February, 1823, when the whole of the lands were reserved from sale or entry, as shown by the decisions of this Court.

The case of *Barry* vs. *Gamble*, 3 Howard, 32, turned upon the validity of a New Madrid location of 640 acres of land by Lafleur, outside of the outboundary line of the village of St. Louis, and the location was not affected by any question of reservations to satisfy the claims of the Spanish villagers of St. Louis protected by the treaty of 1803. The New Madrid certificate in that case was issued to Lafleur 30th November, 1815, by Recorder Bates; notice of location was filed 7th July, 1817, and in the Fall of the year 1818 the district embracing the Lafleur location was surveyed by the United States and closed, which was returned to the Recorder of land titles and the General Land Office in 1820. The Lafleur survey is treated by this Court as made and returned to the Recorder of land titles in 1820. 3 How., 34. The Court held that act of the return of the survey to the Recorder of land titles was the first appropriation and location of the land. 3 How., 51; *Rector* vs. *Ashley*, 6 Wall, 149; and the Act of 26th April, 1822 cured all defects as to the location on section and quarter-section lines. 3 How., 51.

In this case now before the Court, the survey was made of the New Madrid location of J. Smith in March, 1818, before the section and quarter-section surveys had been made by the United States and the New Madrid survey was not made according to quarter-section lines. If this survey had been returned to and approved by the Recorder of land titles before the passage of the Act of 26th April, 1822 the defects of the location would have been cured by the Act. But the survey of Smith's New Madrid location was not returned to the Recorder of land titles until the 26th February, 1823, (Record p. 14), whereby the location was made on that day, and becomes subject to the bar created by the second section of the Act of 26th April, 1822, which annuls the location, because it was not made "to conform to the sectional or quarter-sectional lines of the public surveys as nearly as the respective quantities will admit." When the New Madrid survey for Smith was made in March, 1818, the public surveys were not made, and the section where this land was located was unknown, as will be seen from the description in the patent to Smith, which is a copy of the survey. (Rec. p. 17.)

This N. M. Survey was therefore void when it was made, in 1818, and it was void when it was returned to the Recorder of Land Titles, on 26th February, 1823, because the second section of the Act of 1822 prohibits any such location.

Moreover, another fatal objection to this location appears in the record, p. 23, in this: That the General Land Office, on the 15th of September, 1823, decided that at the first sale of public lands in St. Louis township, on the third Monday of October, 1823, the Register should "withhold from the sale all the fractions which "may be caused by the unconfirmed private claims. If these "claims should not be confirmed, the fractions will disappear. If "they should be confirmed, the lands will then sell for a better "price than at the present time." * * * *

This decision is conclusive evidence that the lands included in Smith's N. M. Survey of March, 1818, and the location of it by the Recorder of Land Titles in February, 1823, were not "on any "of the public lands in said Territory, the survey of which is authorized by law;" * * and this annuls the survey and the location. See N. M., Act of 17th February, 1815, and 29th April, 1822. *Rector* vs. *Ashley*, 6 Wall, 149; 21 How., 431; 3 How., 51.

It is a bold move of the defendant to attempt to overrule and explain the case of *Easton* vs. *Salisbury*, 21 How., 430-1, on this same title, by pretending that the location made by filing the survey of 1818 with the Recorder of Land Titles in February, 1823, was within a year from the date of the Act of 24th April, 1822, and therefore valid. As the N. M. Survey was void, being made on lands within the Spanish village of St. Louis, as defined by the Act of the 13th June, 1812: 1st, because the lands were reserved from sale or entry, to satisfy Spanish claims, confirmed or unconfirmed; 2d, because the N. M. survey was made before the public surveys of township 45 were executed, in direct violation of N. M. Act of Congress of 1815; 3d, because that illegal survey was filed on the 26th February, 1823, with the Recorder, as a location, when the second section of the Act of 26th April, 1822, expressly prohibits such a location to be made at all; and 4th, because the land located upon was not " public land, * * the sale of which is authorized " by law," but land *withheld from sale* by decision of the General Land Office of 15th September, 1823; it is impossible to conceive how any one can propose to question the soundness and conclusiveness of the decision in *Easton* vs. *Salisbury*, 21 How., which was an unanimous decision of this Court on this same title, delivered in 1858. The judgment of this Court is summed up in the opinion at p. 432, thus:

" There was no period from the entry and patent of the New " Madrid claim in which that claim was valid. The location was " not only voidable, but it was absolutely void, as it was made on " land subject to a prior right." See also *Easton* vs. *Salisbury*, 23 Mo., 104-5-6, to same effect. *Mills* vs. *Stoddard*, 8 How., 365, *Bissell* vs. *Penrose*, *id.*, 317.

This case presents the strongest claims for the application of the rule of *stare decisis*. Any attempt to distinguish the present case from the former one in 21st How., would imperil the vast estates in Stoddard's Addition held under similar rulings in the Stoddard cases. The ancient decisions in these New Madrid claims should be upheld in all their integrity.

The former ruling by this Court on this same title is in direct conflict with the present decision of the Court below, and upon a careful examination of the various reasons for holding the New Madrid location and patent void, it appears that there are many more than the one stated by this court in the opinion of 1858.

POINT 2.—The U. S. Survey of 1818, the New Madrid location of it in February, 1823, and the patent of 1827 being void, the title remained in the United States until the 30th June, 1864, when it was granted to J. Smith, or his legal representatives, and the plaintiff being admitted of record (p. 16) to hold the same by derivative title, the statute of limitations for ten years is no defence to this action. 13 Peters, 516.

In the case of *Gibson* vs. *Chouteau*, 13 Wallace, 93, wherein

Mr. Justice Field made a very learned and thorough review of the authorities, the settled rule of this Court was announced to be, that the statute of limitations will not begin to run until the title has passed from the United States, disposes of this question in this case upon the principles established in *Bagnall* vs. *Broderick*, 13 Peters, 450, and other cases.

It is therefore conclusively established that the instructions given by the Court below are erroneous, and that the plaintiff is entitled to recover the land sued for. *Easton* vs. *Salisbury*, 21 How. 431.

The judgment should therefore be reversed and the cause remanded for a new trial.

St. Louis, March 10th, 1874.

BRITTON A. HILL,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1873.

CASE NO. 282.

GEORGE MACKAY.
Plaintiff in Error.
vs.
ALTON R. EASTON,
Defendant in Error

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

By E. CASSELBERRY and W. B. THOMPSON,
Of the Attorneys for Defendant in Error

In the Supreme Court of the United States.

GEORGE MACKAY,
Plaintiff in Error.
vs.
ALTON R. EASTON,
Defendant in Error.

STATEMENT OF DEFENDANT IN ERROR.

Plaintiff in error brought an action in ejectment in the Circuit Court of the United States for the Eastern District of Missouri, to recover a parcel of land in the city of St. Louis, from the defendant in error, in which judgment was rendered in favor of defendant, to reverse this judgment this writ of error is prosecuted.

By the bill of exceptions it appears that a person whose name is given, a "J Smith," claimed lots numbered 9 and 10, in the town of Little Prairie, New Madrid County, in the Territory of Missouri, before the Board of Commissioners, and on the 9th day of July, 1811, the Board of Commissioners, after hearing testimony, granted to *J. Smith* two arpens of land, and ordered that the same be surveyed on his possession at his expense, under the provisions of the Act of Congress approved March 2, 1805; which confirmation was numbered 1116, and called certificate No. 1116. That afterwards, in pursuance of the provisions of an Act of Congress approved 17th February, 1815, the Recorder of Land Titles, after taking testimony, certified that the lots of land in the village of Little Prairie, in New Madrid County, had been materially injured by earthquakes in New Madrid, and issued a certificate of re-location after the relinquishment of the land to the United States.

The certificate of the Recorder of Land Titles was dated Novemper 16th, 1815, and numbered 159. This certificate was in the usual form of a New Madrid certificate, and entitled J. Smith, or his legal representatives, to locate any quantity of land not exceeding one hundred and sixty acres.

That afterwards, on the 22d day of October, 1816, James Smith (blacksmith) and Sarah his wife, executed a deed purporting to convey to Rufus Easton, in fee simple, two arpens of land "situate in the village of Little Prairie, in the county of New Madrid, granted to the said James Smith by the late Board of Commissioners for the adjustment of land titles, etc., by the name and description of J. Smith, and known on their books by claim and certificate No. 1116;" also one other lot, which said lots of ground and tracts of land have been materially injured by earthquakes, and conveying and assigning to Easton the right and privilege of location, and the land so to be located. This deed was acknowledged and recorded in New Madrid County, November 20th, 1816.

It was admitted, on the trial of the case, that all of the title conveyed by the foregoing deed, executed of James Smith (blacksmith), was vested in defendant in error.

On the first day of November, 1816, notice was given to the Surveyor General of the location of certificate No. 159, on land including the premises in dispute.

In March, 1818, the survey No. 2491, was made under the authority of the United States, covering the land in controversy.

It was admitted on the trial that the survey No. 2491 was returned to the Recorder of Land Titles on the 23d day of February, 1823.

Defendant in error then read in evidence patent of the United States to J. Smith, or his legal representatives, sent to William Russell, St. Louis, May 31st, 1827.

It was admitted on the trial that the title, vested in William Russell by virtue of this patent, was vested in defendant in error, and that the defendant in error had been in adverse possession of the land in controversy for more than ten years prior to the institution of this suit.

BRIEF BY DEFENDANT IN ERROR.

The defendant showed a strict legal title to the land in controversy; and also showed as a matter of abundant caution that he had been in the adverse possession of the land in suit more than ten years next before the commencement of this action, which is a sufficient time to bar any right to the land that the plaintiff may have had, according to the laws of the State of Missouri. The first section of the Act of February 2, 1847, of the legislature of the State of Missouri, which is still in force, is as follows: "Section 1. No action at law or suit in equity, for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this State, unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seized or possessed of the premises in question, within ten years before the commencement of such action or suit."

The legal title of the defendant consists, *firstly*, of a confirmation to J. Smith, on the 9th of July, 1811, by the United States of two arpens of land in the town of Little Prairie; *secondly*, a certificate of re-location, in lieu of the same land, dated November 16, 1815, to J. Smith or his legal representatives, under the Act of Congress of February 17, 1815; *thirdly*, the location of the certificate and the survey of the land on which the same was located; *fourthly*, the return of the survey by the Surveyor-General to the Recorder of Land Titles, on the 23d of February, 1823, being within a year from the time of the passage of the Act of Congress of April 26, 1822; *fifthly*, the issue of the patent certificate by the Recorder of Land Titles which was based on the return to him by the Surveyor-General; *sixthly*, the issue of the patent dated May 28, 1827; *seventhly*, the deed from J. Smith and wife to Rufus Easton, dated October 22, 1816, duly acknowledged on the same day, and recorded on the 20th day of November, 1816, in the proper county; *eighthly*, the admission that defendant owns all of the right, title and interest which was conveyed to Rufus Easton by the above mentioned deed from Smith and wife to him.

The plaintiff made three objections to the admission of the patent in evidence, which are mentioned on page 16 of the printed record.

For the first objection to the patent the plaintiff alleges that the location was made on the land, the sale of which was not authorized by law; but he offered no evidence to sustain the objection, and consequently the court properly disregarded the objection.

For the second objection to the patent the plaintiff alleges that the patent had been judicially decided by the Supreme Court of the United States, to be null and void in the cases therein mentioned; but he offered no evidence to show that the land in suit is any portion or part of the land which was in suit in any of the cases alluded to on page 16 in the printed record herein. The tract of land in controversy in the cases mentioned on page 16 in the printed record herein, is the land that was confirmed by the Act of Congress of July 4, 1836, to Mordecai Bell, or his legal representatives; but the land in suit in the case at bar is described in the answer on pages 3 and 4 of the printed record, and is not within the tract confirmed to Bell; and consequently the cases cited in the printed record on page 16 have no application whatever to the case at bar. Nor would the plaintiff be in any better condition if the land in controversy were within the Bell tract, because he claims under Smith, and not under Bell; and as the Bell title is superior to the Smith title, it would be an outstanding title against the plaintiff sufficient to prevent him from recovering in this action by virtue of the Smith title.

For the third objection to the patent the plaintiff alleges that the land was reserved from sale, and was not located in accordance with sectional and quarter sectional lines, and upon land not surveyed, and was not located in season to be validated by the act of Congress approved April 26, 1822. The plaintiff offered no evidence to show that the land was reserved from sale. The evidence shows that the land was surveyed in March, 1818. (See page 13 & 14 of the printed record.) This was before the act of 1822 was passed which ratified all such surveys and locations made before that time. In fact the act of 1822 purports on its own face to ratify all locations and surveys made before that time. (See the act of 1822 on page 20 of the printed record.)

In the case of Barry vs. Gamble, 3 Howard, page 32, this court decided that under the act of Congress of February 17, 1815, a New Madrid certificate could be located upon any lands before the same were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor, and that it was sufficient if the land could have been surveyed and sold by the executive department.

The points intended to be decided by the three cases, referred to on page 16 of the printed record, are that the confirmation to Mordecai Bell, or his legal representatives, is a superior title to a New Madrid location; and that all locations and parts of locations, made under the New Madrid act, which are not within the Bell tract, are valid, binding and lawful.

The plaintiff objected to the deed of James Smith and wife to Rufus Easton, (pages 17 and 18 of the printed record) which was read in evidence by the defendant, on the alleged ground that it could not be presumed that a deed from James Smith, blacksmith, of Cape Girardeau county was a deed from J. Smith, of New Madrid.

The defendant claims to be the owner of the strict legal title to the property in dispute, and also as a matter of abundant caution set up the statute of limitations. The deed of Smith and wife to Easton is certainly good color of title under the statute of limitations; and as the plaintiff only objected on the ground of the identity of Smith, his objection would not hold good so far, at least, as concerns the statute of limitations. For this reason the court did not err in admitting the deed in evidence.

When we take into consideration the history of the times, we can safely come to the conclusion that the James Smith mentioned in the deed was the same J. Smith that received the certificate of confirmation from the Board of Commissioners for the two arpens of land in the town of Little Prairie.

There is no evidence showing that J. Smith was a resident of the town of Little Prairie after the 20th of December, 1803. Public history informs us that the earthquakes in the New Madrid country commenced early in December, 1811. The shock of December 17, 1811, was the one which mainly destroyed the village of Little Prairie; and the shock that did the material injury to the village of New Madrid was on the 17th of February, 1812. (See United States Recorder Hunt's Minutes, No. 2, p. 154 and 155.) These facts stated in public history raise a strong presumption that J. Smith was not in Little Prairie at the time or after the earthquakes. The violent presumption is, that he left, and went elsewhere to save his life. Besides, the county of New Madrid included the county of Cape Girardeau until 1813. The county of Cape Girardeau was established by the Legislature in 1813. In organizing the new county the presumption is that the residence of J. Smith was included in the new county. In addition to all of this, Rufus Easton located the land, and was treated by the government as the true owner, and his legal representatives have been exercising acts of ownership over the land for more than fifty years, without objections. All of these circumstances, together with others, that will naturally occur to any one, go to show that the Smith who conveyed the land to Rufus Easton in 1816 was the true Smith to whom the two arpens of land were confirmed in the town of Little Prairie.

As there are no questions of law arising out of the direct or rebutting testimony offered by the plaintiff, it is not necessary to discuss the same any further than to say that it is wholly irrelevant, and incompetent to prove the issues; all of which will be sufficiently obvious on reading the same.

Having fully answered all of the questions of law made in the record by the plaintiff, we ask that the judgment of the court below be in all things affirmed.

E. CASSELBERRY,
W. B. THOMPSON,
Of the Attorneys for the Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

GEORGE MACKAY, Plaintiff,

vs.

ALTON R. EASTON, Defendant.

Statement of the Case by Defendant's Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

GEORGE MACKAY, Plaintiff,

vs.

ALTON R. EASTON, Defendant.

Statement of the Case by Defendant's Counsel.

This is an action of ejectment for a lot of ground in the city of St. Louis, Missouri. The petition is in the usual form.

The answer denies plaintiff's right, and pleads actual possession by defendant for fifty years, as a bar.

Judgment below was given for defendant, and plaintiff appeals to this Court.

Both parties claim under one "J. Smith."

PLAINTIFF'S EVIDENCE.

1. Act of Congress of June 30, 1864. This act grants to J. Smith, or his legal representatives, all the right, title and interest, of the United States to the land located under New Madrid Certificate No. 159, U. S. Survey 2491.

The premises in dispute are a part of the land so located.

2. Plat of Village of Little Prairie. [See plat.]

3. Confirmation by the Board of Commissioners—commonly called the Old Board—by certificate No. 1116, July 9, 1811, to J. Smith, for two arpents of land in the District of New Madrid, Village of Little Prairie, "to be surveyed," on his possession, by virtue of permission to settle from the proper Spanish officer, and

also actual inhabitation and cultivation prior to 20th of December, 1803.

4. New Madrid Certificate of Location, No. 159, to "J. Smith," or his representatives, to locate 160 acres of land in lieu of "two arpents in the village of Little Prairie, County of New Madrid, materially injured by earthquakes."

5. List of Patent Certificates dated 4th of June, 1823, to J. Smith, for same land and same title.

6. United States Survey 2491, for J. Smith, or legal representatives, for land located under New Madrid Certificate 159. made in Mar 1818

Part of the land covered by this survey is also covered by a Spanish grant to Mordecai Bell (Stoddard vs. Chambers, 2 Howard); but there is no such conflicting claim to any part of the premises in dispute, the same being wholly outside of the Stoddard, or Bell, claim.

7. Tabular Lists from the office of the Recorder of Land Titles, showing that survey 2491 was made by Brown, Deputy Surveyor, in 1818, and was returned to the Recorder of Land Titles on the 26th of February, 1823.

8. Bond of J. Smith, bearing date 14th of April, 1816, agreeing to convey to Andrew P. Gillespie all his lots in the Village of Little Prairie confirmed to him. This bond was first recorded 22d of April, 1872.

"9th. Deed of J. Smith to Andrew P. Gillespie, dated 5th March, 1819. The deed referred to in the foregoing is in the words and figures following, to-wit:

Deed of J. Smith to Andrew P. Gillespie, dated 5th March, 1819.

"Know all men by these presents that I, J. Smith, of the county of New Madrid, lately of the village of Little *Prairie*, do, for and in consideration of one hundred and fifty dollars to me in hand paid by Andrew P. Gillespie at and before the ensealing and delivery of these presents, grant, bargain, and sell, alien and convey unto the said Andrew P. Gillespie, his heirs and assigns, all those two certain arpents of land in the village of Little

Prairie, in the Territory of Missouri, confirmed by the late board of commissioners to ; and I also grant, bargain, and sell every certificate or *certificate* or certificacy of location in the Territory of Missouri on any land the sale of which is authorized by law, hereby covenantiug to warrant and defend the title to the said certificate of new location and the land to the said Andrew P. Gillespie, his heirs and assigns, forever.

"In testimony whereof I, the said J. Smith, have hereunto set my hand and seal this fifth day of March, one thousand eight hundred and nineteen.

(Signed) J. his ⋈ mark SMITH. [SEAL.]

In presence of us.
JESSIE PRINDLE.
H. HARRISON.

TERRITORY OF MISSOURI.
County of New Madrid, s. s.:

"I, Enoch Evans, clerk of the circuit court for the county of New Madrid, in the southern circuit of the Territory of Missouri, do certify that J. Smith appeared personally before me, and he acknowledged the within indenture to be his act and deed, hand and seal, for the uses and purposes therein mentioned. In testimony whereof I have hereunto set my hand and seal this fifth day of March, 1819, and having used my private seal, there being no official seal yet provided.

ENOCH EVANS, *Clerk.* [SEAL.]

"Filed and recorded August 23rd, 1871.
(Signed) W. C. KENNETT, *Recorder*."

10. Any title conveyed to Gillespie by above deed was admitted to be vested in plaintiff.

DEFENDANT'S TITLE.

1. Patent issued 31st of May, 1827, to J. Smith, or representatives, under same survey and certificate of location delivered to Russell, who claimed under Smith.

2. Deed of James Smith, blacksmith, to Rufus Easton, 22d of October, 1816, recorded 20th of November, 1816, for the two ar-

pents in Little Prairie, confirmed to him under the name and description of "J. Smith," per Confirmation No. 1116. Also, authority to locate, &c.

3. It was admitted that all the title of Rufus Easton was vested in defendant. And, *also, that defendant had been in actual possession of premises for more than ten years before this suit was brought.*

The same fact was proved by William H. Cozzens, who also proved that survey 2491 was not located according to sectional, or quarter-sectional, lines.

4. Act of Congress "to perfect certain locations and sales of public lands in Missouri, approved April 26, 1822.

Plaintiff in rebuttal proved by one Hesse, recorder of Land Titles, that certain extracts were from books filed in the office of the Recorder of Land Titles. As he testified that he "had no information on the subject except what he got from the books," I will not copy his testimony.

These extracts purport to be extracts of the field notes of surveys of sectional lines in fractional township 45 N., R. 7, E. 5 M., covering premises in dispute. At the bottom of one of them is the date, April 30, 1818. Here both parties admitted that survey 2491 was returned to the Recorder February 23, 1823.

Plaintiff then read a letter of George Graham, Com'r, to William Christy, Register at St. Louis, dated 15th September, 1823, instructing him to withhold from sale all fractions caused by private unconfirmed claims.

Plaintiff then gave in evidence New Madrid certificate 160, to James Smith, for one arpent in the town of New Madrid, and also certain other evidence and documents tending to prove, as plaintiffs contended, that the confirmee of the two arpents in Little Prairie, in lieu of which New Madrid certificate 159 was issued, was another and a different person from the James Smith who conveyed to Rufus Easton in 1816. And, also, a stipulation by the parties to this suit that about one hundred and forty-five other suits now pending in the court below should abide the result of this case.

BRIEF.

In 1811, a great portion of the county of New Madrid, Missouri, was ruined by earthquakes, and Congress passed the New Madrid act, so-called, approved February 17, 1815, whereby it offered to the sufferers the privilege to exchange their injured land for any land the sale of which was authorized by law; and provided, that, in such cases, the person desiring to exchange, should relinquish the New Madrid land to the government, prove its injury, and receive from the Recorder of Land Titles a certificate of location, which is but another name for a land warrant.

The Recorder, in carrying out the provisions of the act, adopted the pernicious habit of issuing the certificate to the original owner, "or his legal representative," instead of taking testimony as to whether the claimant was the owner, and issuing the certificate directly to him. The result has been to entail upon the people and courts of the country litigation extending over a period of fifty years, to ascertain who were the true representatives of the original owners.

This is a case of that character.

The New Madrid—like all other government bounties, or benevolences—became, in almost every instance, the food of speculators. Parties appeared before the Recorder, claiming to be the owners of land, who were not really so, and obtained and located many of the certificates so issued, it being then a mooted question whether the certificate did not create a new title.

The courts, however, have settled the proposition that it is not a new title, and that plaintiff, claiming such a title, must show a derivative title from the original owner.

McCamant vs. Patterson, 39 Mo.

Wear vs. Hickman, Mo.

Lessieur vs. Price, 12 How., 59.

The plaintiff in this case attempts to prove his title under "J. Smith," by the deed to Gillispie, bearing date March 5, 1819. (Record p. 15), and claims that that deed conveyed to the grantee the two lots Nos. 9 ank 10, Little Prairie, that originally belonged to J. Smith; and the plaintiff further claims that said two lots were the same land described as "two arpents of land," confirmed by the commissioners to J. Smith, by confirmation No. 1116, July 9, 1811, and in lieu of which New Madrid location certificate No. 159 was issued.

This deed bears date March 5, 1819, but was not recorded until August 23, 1871, *a period of fifty-two years*, during all which time there is no pretence in, or out of, the record that plaintiff, or his grantors, exercised any acts of ownership over, paid any taxes upon, or made any substantial claim to the premises in dispute.

On the other hand the deed of James Smith to Rufus Easton was duly recorded on the 20th November, 1816, three years before the deed to Gillespie. Easton and his heirs and vendees have obtained a patent to "J. Smith," or his legal representatives in 1827; the city of St. Louis has spread over the property, and great numbers of people have bought and built upon it, as appears by the fact that one hundred and forty-five suits for the land are now pending in the court below, and awaiting the issue of this trial. It is admitted that defendant has been in possession for more than ten years.

Under these circumstances I insist no presumptions will be indulged in by the court in favor of this deed. Every presumption is against it. If plaintiff has treated it as not being worth the recording for fifty-two years, and has stood by all that time, it is clear that he cannot ask this court, long after the actors are dead, to indulge in presumptions in his favor.

The only description of the property is two arpents confirmed by the board to ————. Whether this means the two arpents confirmed to J. Smith, or some other two arpents, confirmed to another and a different person, is left altogether to conjecture. In the conveyance of land, especially in early times, when the chain between the owner and the government consists of few links, it was usual to describe the land sold by refering to the name of the original confirmee and the confirmation itself. Certainly such a description would be natural and perfect. For instance, if two arpents in Little Prairie originally confirmed to John Doe had been purchased, or was owned by J. Smith, and he had sold the same to Andrew P. Gillispie, a deed describing the land as two arpents confirmed to John Doe, would carry the title.

It cannot be affirmed witb certainty that the blank should be filled with the name of J. Smith.

Whether, if possession had followed the deed for fifty years, the court would presume anything in favor of it, is not the question. The acts of all parties for two generations are against the claim of plaintiff, and the presumptions arising from that fact effectually rebut any inferences as to what was intended to be put in the blank.

When possession has been held for a long time, and the acts of all parties favor the deed, it is just to make every fair presumption in its favor, but when possession and the acts of all parties for half a century are against the deed, the presumption is just the other way.

The transfer of any certificate of location contained in the deed, must refer to the right to a certificate appurtenant to the land conveyed—for, as it was only upon relinquishing the injured land that a certificate could issue, the grantor had no right to any certificate except to land owned by himself, or, if the land had been purchased by him from the original confirmee, then for land owned by such original owner, and therefore it does not help out the description.

II.

The legal title emanated from the Government by the Patent issued to J. Smith, or his representatives, in 1827, and therefore limitation is a bar to plaintiff's action.

It is admitted that the survey was returned to the Recorder February 26th, 1823, being within the time prescribed by the Act of 22d of April, 1822. This case, therefore, bears no analogy to Easton vs. Salisbury. 21 How, 426.

The location was not void on account of non-conformity to sectional and quarter-sectional lines. Barry vs. Gamble, 3 How, 32.

There is no adverse claimant here. The "J. Smith" title is the only title claimed by any one to the premises in dispute. The Patent is conclusive against the Government, estops it, and any person claiming under it by subsequent grant, and if the Act of 1864 conveys a new title to plaintiff he is a subsequent grantee.

The Act of 1864 was intended to perfect the J. Smith claim, as it then stood, and not to disturb titles by giving a new title to plaintiff.

The fact that part of the land described in the Patent was covered by an adverse superior claim, does not invalidate the Patent as to the residue. 15 Peters 88; 9 Wheat 677

The letter of Mr. Graham, of the 15th of September, 1823, does not, and under the Act of the 22d of April, 1822, perfecting the location made in 1818, could not, affect the location.

The location spoken of in the Act of 1822 was the act done by the holder of the warrant, and not the perfection of the exchange by the Recorder of Land Titles. Gibson vs. Chonteau, 39 Mo. 560

The Patent is conclusive against the Government, unless it contravenes some law of Congress, and it would repeal and withdraw any reservation made by order of the Commissioner of the General Land Office.

It is conclusive as to all acts of the Executive Department prior to its issue, and especially after a lapse of nearly half a century. 7 Wheat 212

Easton v Salisbury was a contest between J. Smith New Madrid Location & Bells Spanish Grant. The court speaks of their comparative merits. This land never was covered by any conflicting title.

Barry v Gamble settles the point that the act of 1822 validates locations in township 45. although the lands had not been offered for sale or the sectional lines surveyed As to the land being within the village of St Louis and not authorized to be sold see Gibson v Chouteau 39 Mo 570.

All the points made by plaintiffs here were raised by Gibson v Chouteau 13. Wall, 92 & were not deemed worthy of notice by the Court see brief of Glover & Shepley on file in that case

C. Gibson
p.d.,

12 nº 189

D

Motion to [illegible]

19-635 Filed by Daly

Submitted Nov 7

Nov 7 —

Motion to dismiss to be heard with merits —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 306.

ANTONIO AICARDI, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

Affirmed —

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED DECEMBER 2, 1872.

Chf Justice to take —

Oct 2, 1875

SUPREME COURT OF THE UNITED STATES.

No. 306.

ANTONIO AICARDI, PLAINTIFF IN ERROR,

VS.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 *Caption.—Supreme court, June T.*, 1872.

Be it remembered that a regular term of the supreme court of the State of Alabama, was begun and held according to law, at the capitol, in the city of Montomery, on the first Monday of June, A. D. 1872, being the third day of said month.

Judges supreme court.

Present and presiding as judges of said court:
Honorable E. W. Peck, chief justice;
" Tho's W. Peters, associate "
" B. F. Saffold, " "

Transcript of the record and proceedings had in the circuit court of the county of Lowndes and State of Alabama, in the case of the State of Alabama, plaintiff, and Antonio Aicardi, defendant.

Caption.—Circuit court Lowndes County.

Be it remembered that, at a circuit court, begun and holden in and for the county of Lowndes, & State of Alabama, at the court-house thereof, in Hayneville, the place of holding the same, on the second Monday after the third Monday in April, it being the 29th day of April, in the year of our Lord 1872, the honorable James Q. Smith, judge, presiding, the following proceedings were had in the following stated case, viz:

THE STATE
vs.
ANTONIO AICARDI.

Caption.—Criminal court Dallas County.

THE STATE OF ALA.,
Dallas County:

Be it remembered that the following proceedings were had at a regular triennial term of the criminal court of Dallas County, begun 2 and held in and for Dallas County and State of Alabama, at the place of holding the same, on the first Monday in December, it being the 4th day of December, A. D. 1871. Present and presiding, the honorable George H. Craig, judge.

Venire facias.

Criminal court of Dallas County.

THE STATE OF ALABAMA,
Dallas County:

To Marcellus DeCamp, sheriff of Dallas County:

You are hereby commanded to summon the following-named gentlemen, to wit:

A. J. Mullen,	merchant,	Selma beat.
R. E. Baker,	"	" "
T. M. Cook.	clerk	" "

S. M. Payne,	farmer,	Bu'nsville.
Jno. F. Thompson,	merchant,	Selma.
J. J. Babcock,	farmer,	Cahaba.
H. Chambers,	"	Athens.
R. R. Prunivance,	"	Selma.
H. B. Corwin,	"	Woodlawn.
Jno. W. Ladd,	"	Richmond.
A. G. Shackelford,	merchant,	Selma.
S. P. Albea,	farmer,	Bellvieu.
Ned McCraw,	laborer,	Selma.
H. G. Martin,	farmer,	Dublin.
J. H. Barlow,	"	Pleasant Hill.
W. E Wailes,	merchant,	Selma beat.
T. W. Partridge,	"	" "
Isaac Billingslea,	farmer,	" "

To be and appear before the honorable the judge of our next criminal court, to be held in and for Dallas County and State of Alabama, at the place of holding the same on the first Monday in December, it being the 4th day of December, A. D. 1871, then and there to serve as grand jurors for and during said term of said court, or until discharged
by due course of law, and this you shall in no wise omit; and
3 make due return of this venire facias and execution thereof.

Witness my hand at office, this 13th day of November, 1871.

R. B. THOMAS, *Clerk.*

Sheriff return.

Executed a venire or all those above named who are marked with a cross opposite their names on the right side. All others not thus marked not found.

December 4th, 1871.

W. A. BRANTLY,
Sheriff.

Organization of grand jury.

MONDAY MORNING, *December* 4, 1871.

The court met in its usual form, the honorable George G. Craig present & presiding, and upon calling the grand jury summoned to be in attendence on the court for the present term, the following gentlemen appeared and answered to their names: F. M. Cook, J. J. Babcock, A. J. Mullen, S. M. Payne, W. E. Wailes, R. E. Baker, T. W. Partridge, A. G. Shackleford, Isaac Billingslea; absent, Jno. G. Thompson, R. R. Prunivance, S. P. Albea. For good cause shown to the court, W. E. Wailes, T. W. Partridge, R. E. Baker, A. G. Shackelford, and Isaac Billingslea were excused from serving on the grand jury.

The court thereupon ordered the sheriff to summon twenty-six additional persons, suitable to serve on the grand jury, to be present this evening at 1 o'clock. Then the court adjourned until 1 o'clock this evening.

MONDAY EVENING,
December 4, at 1 o'clock p. m.

4 The court met pursuant to adjournment, the honorable George H. Craig, present and presiding.

The sheriff of Dallas County returned into open court the following list of persons summoned under a previous order of this court to serve as grand jurors:

Tho's J. Melton, Simeon Vasser, L. W. Patten, Jeffrey Crown, George D. Butler, W'm Washington, J. H. Oswell, H. C. Hatcher, Rob't W. Morrison, Wash. C. Clarke, Samuel Chestnut, R. E. P. Smyley, Rob't R. Peeples, W'm A. Rogers, J. W. Valtz, R. J. Vantbook, Ben. C. Harrison, John Robbins, John Meraw, Henry Call, Rice Connoly, Ed. Woods, G. W. Mallim, Jno. R. White, Jno. S. Corbin, W'm J. Russell From which list the following names were drawn to serve: John K. White, W. J. Russell, John Mirron, Geo. W. Matherson, Jeffrey Crown, W'm A. Rogers, Jon. S. Corbin, Samuel Che'tnut, L. W. Patten, H. C. Hatcher, Simm Vasser, Henry Hall, Rice Connoly, J. W. Valtz.

The grand jury for the present term of the court then stood as follows, viz:

H. C. Hatcher, Jno. K. White, Jno. S. Corbin, Rice Connoly, A. J. Mullen, W. J. Russell, Sam. Che'tnut, W'm A. Rodgers, F. M. Cook, John Morrow, L. W. Patten, J. W. Valtz, J. J. Babcock, Geo. W. Matherson, Simeon Vasser, L. M. Payne, Jeffrey Crown, Henry Hall.

Appointment of foreman.

And thereupon H. C. Hatcher was nominated and appointed foreman of the grand jury, and took the oath as such foreman. The other members of the grand jury were then sworn according to law, and, after receiving the charge of the court, they retired to consider of the presentments, and Healy Quartermers was sworn as bailiff, to attend the grand jury.

5 And now, on this day, to wit, the 7th day of December, A. D. 1871, the grand jury came into open court, all of their number being present, and presented forty-eight bills of indictment.

Excuse of foreman of grand jury.

And thereupon H. C. Hatcher, who was, on a former day of the present term nominated, appointed, and sworn as foreman of the grand jury of the present term of this court, came forward, and upon oath, showed unto the court that he was unable to serve on said grand jury of Dallas County on account of his being sick. It was therefore ordered by the court that the said H. C. Hatcher be excused from further service on the grand jury of Dallas County for the present term of the court.

Appointment of foreman.

And it appearing to the court that there was no foreman of the grand jury of the present term of the court on account of sickness, and thereupon A. J. Mullen, who is a member of the grand jury, was nominated and appointed foreman of the grand jury, and took the oath as such foreman of the grand jury; and, the grand jury having further business to attend to, they retired.

And now, on this day, to wit, the 11th day of December, A. D. 1871, the grand jury came into open court, and all of their number being present, and presented eighty-nine bills of indictment; when, having further business to attend to, they retired.

Indictment.

Criminal court, December term, 1871.

THE STATE OF ALABAMA,
Dallas County:

6 The grand jury of said county charge that, before the finding of this indictment, Antonio Aicardi, on, to wit, the 2d day of December, 1871, kept and exhibited a gaming-table for gaming, or was interested or concerned in the keeping or exhibition thereof, against the peace and dignity of the State of Alabama.

S. W. JOHN, *Solicitor.*

True bill.

THE STATE
vs.
ANTONIO AICARDI. } No. 403.

Keeping a gaming-table. No prosecutor. Witnesses: Henry Hall. A true bill.

A. J. MULLEN,
Foreman of Grand Jury.

Filing.

Filed in open court this the 11th day of December, 1871.

R. B. THOMAS, *Clerk.*

Capias.

THE STATE OF ALABAMA,
Dallas County:

To any sheriff of the State of Alabama:

An indictment having been found against Antonio Aicardi at the triennial term for December, 1871, of the criminal court of Dallas County, for the offense of keeping a gaming-table, you are therefore commanded forthwith to arrest the said defendant, and commit him to jail, unless he give bail to answer said indictment, and that you return this writ according to law. Dated this 11th day of December, 1871.

R. B. THOMAS,
Clerk Criminal C't D. C.

Sheriff's return.

THE STATE OF ALABAMA
vs.
ANTONIO AICARDI. } Capias.

7 Executed by arresting the defendant and bringing him into open court this the 16th day of December, 1871.

W. A. BRANTLEY, *Sheriff.*

Recognizance.

In criminal court, triennial term, 1871. December 16, 1871.

THE STATE OF ALABAMA, *Dallas County:*

THE STATE
vs.
ANTONIO AICARDI. } Indictment for keeping gaming-table.

In open court came Antonio Aicardi, James Ford, and W'm R. Ditman, and agreed to pay the State of Alabama five hundred dollars if the said Antonio Aicardi fails to appear at the present term of this court, and from term to term thereafter until discharged by law, to answer an indictment pending against him for keeping a gaming-table.

Continuance.

THE STATE
vs.
ANTONIA AICARDI. } Keeping a gaming-table.

4TH JANUARY, 1872.—Continued by the defendant until next triennial term on payment of costs up to date.

Caption.—Criminal court.

Be it remembered that the following proceedings were had at a regular triennial jury-term of the criminal court of Dallas County, begun and held in and for Dallas County and State of Alabama, at the place of holding the same, on the first Monday in March, it being the 4th day of March, A. D. 1872.

Present and presiding, honorable Geo. H. Craig, judge.

8 *Petition for removal of trial.*

THE STATE OF ALABAMA
vs.
ANTONIA AICARDI. }

The said Antonio Aicardi, being duly sworn, states on oath that he cannot have a fair and impartial trial in Dallas County in this case. It is alleged, and generally believed in said county, that this defendant, and others concerned with him in carrying on a lottery chartered by law in Alabama, wilfully violated the law in conducting said lottery; and, by falsely representing that said lottery was authorized by law to be conducted in the manner that it was, induced a large number of persons to deal with them, and thereby to become involved in a like alleged violation of the law; whereas, in conducting said lottery, this defendant was acting as the agent of others who were the proprietors thereof, and who, as affiant is informed and believes, and so states, were advised by counsel learned in the law, that they had the right by contract and solemn engagement of the State of Alabama to conduct the same by means of the same appliances that were usually employed in a lottery described in the statutes of the State as the game of "keno." But affiant states that, notwithstanding he in good faith

acted in whatever he did in the premises, under the belief that his participation in conducting said lottery was lawful*ly*, and no more harmful to the public morals than any other lottery, still he states that a number of persons have decried his conduct as immoral and unlawful, and injurious to society, and have made public and
9 general their opposition to him on such grounds, and have deeply impressed many persons in Dallas County with the belief that his conduct is odious and should be suppressed by any means. Affiant further states that, about the time the indictment in this case was found by the grand jury, the Selma Times, a daily newspaper of large circulation, and much influence, published in Selma, in an article that appeared in its columns on several occasions, urged the prosecution of the persons engaged, as this defendant is charged in this indictment as having been engaged, in the exhibition of gaming-tables, and referred to the lottery conducted by affiant as evidence of guilt in that respect. And in said article many things were stated both as matters of fact and by way of indignant commentary thereon, which are unjust to this defendant, and were strongly calculated or adapted to cause prejudice *and that* and public indignation against him and his employees and others concerned in dealing with his lottery; and that by such means, and others unknown to affiant, the public mind in this county has become much prejudiced against him and his employees. Affiant further states, upon information and belief, that the tenor of some of the articles in said newspaper was that this defendant and those concerned with him in conducting said lottery were, and are, guilty of exhibiting a table for gaming, and that the question had been so decided by the court.
10 A large number of indictments against various persons for the alleged offense are pending in this court, and it has caused a general and free discussion in the community as to the guilt of this defendant, and others concerned with him, and many persons have, in their own minds, prejudged the case and have expressed the opinion this defendant is guilty as charged in the indictment in this case. Affiant further states, on like information and belief, that the same exceptions herein above stated as to a trial of this cause in Dallas County, also applies to the county of Perry; that said newspaper, the Selma Times, has a large circulation and a strong and widely disseminated influence in said county, and that the prejudice created against this defendant by the articles in said newspaper above referred to have been widely circulated in said county of Perry.

ANTONIO AICARDI.

Affidavit.

In open court comes Antonio Aicardi, who, being by me duly sworn, deposes and says that the facts set forth in the foregoing petition are true, to the best of affiant's information and belief.

ANTONIO AICARDI.

Sworn and subscribed before me, in open court, March 27, 1872.

R. B. THOMAS, *Clerk*.

Filing.

Filed March 27, 1872

R. B. THOMAS, *Clerk*.

Order of court on petition.

THE STATE
vs.
ANTONIO AICARDI. } Indictment for keeping gaming-table.

11 28TH DAY OF MARCH, 1872.

On this day came S. W. John, esq., solicitor for Dallas County, who prosecutes the pleas of the State, and also came the defendant, Antonio Aicardi, in his own proper person and by counsel, and the defendant being arraigned at the bar in open court on the indictment in this cause, for plea says he is not guilty, and submitted to the court his application for a change of venue from this county to Lowndes County, in the State of Alabama; and the defendants consent of record, that the witnesses in this case, for the prosecution, may be examined on interrogatories on such terms as the court may prescribe, and also pay the clerk five cents for each mile to and from the court-house to which the trial of this case is removed. And thereupon, on the application of the defendant, and for good cause shown why this defendant cannot have a fair and impartial trial in this court, it is ordered by the court that the trial of this case be removed from this county to the circuit court of Lowndes County, in the State of Alabama, it being the nearest county free from exception. And the clerk of this court must make out a transcript of all the entries, orders, and proceedings in this case, including the organization of the grand jury, the indictment, the endorsements thereon, all the entries relating thereto, the recognizance of the defendant, and the order of the removal of the trial of this cause
and forward the same, under seal, by special messenger, to the
12 clerk of the circuit court of Lowndes County, together with the
original subpœnas in this case.

Bill of exceptions.

In criminal court of Dallas County.

THE STATE
vs.
ANTONIO AICARDA. } Keeping a gaming-table.

Be it remembered that, when this case was called for trial, the defendant made application in due form for a change of venue, and proved to the court by affidavit that he could not have a fair and impartial trial in the county of Dallas or the county of Perry; and that the county of Lowndes was the nearest county free from exception. Thereupon the court decided that the application was sufficient, and that the same should be changed to the circuit court of Lowndes County. The solicitor then moved the court that the defendant be required to consent of record that the witnesses for the prosecution may be examined on interrogatories on such terms as the court may prescribe. The defendant objected to the motion and objected to being required to give such consent, on the ground that he had, by the Constitution, a right to be confronted by the witnesses against him. But the court overruled the defendant's objection, and the defendant excepted; and the court required the defendant to make the consent of record as moved by the solicitor as a condition precedent to the change of venue; and the defendant excepted to the ruling of the court. Thereupon the defendant, without waiving his exception, consented that the witnesses for the prosecution 13 may be examined on interrogatories, on such terms as the court may prescribe; and the venue was changed. And this, the defendant's bill of exceptions, is signed, sealed, and made a part of the record in term time, March 27, 1872.

GEORGE H. CRAIG, [SEAL.]
Judge Criminal C't D. C.

Filing.

Bill of exception filed in open court, this the 12th day of April, 1872.

R. B. THOMAS, *Clerk.*

Clerk's certificate.

THE STATE OF ALABAMA,
Dallas County:

I, R. B. Thomas, clerk of the criminal court of Dallas County, in said State, do hereby certify that the foregoing pages, from one to ten, inclusive, contain a full and complete, true, and correct transcript of all the entries, orders, and proceedings in the case of the State of Alabama vs. Antonia Aicardi, for keeping a gaming-table, including the organization of the grand jury, the indictment, the endorsements thereon, and all the entries relating thereto, the recognizance of the defendant, and the order for the removal of the trial of said cause. I, R. B. Thomas, clerk as aforesaid, do further certify that the said defendant made application to the honorable, the judge of our criminal court of Dallas County, and obtained an order, changing the venue, and removing the trial of said case from said court to the circuit court of Lowndes County, in the State of Alabama.

In witness whereof, I, R. B. Thomas, clerk, as aforesaid, have hereunto set my hand and affixed the seal of said court, in Selma, 14 Dallas County, Alabama, this the 27th day of April, A. D. 1872.

R. B. THOMAS, *Clerk.*

Judgment Lowndes circuit court.

In Lowndes circuit court, spring term, 1872.

THE STATE
vs.
ANTONIO AICARDI.

Came the State, by its solicitor; also came the defendant in his own proper person and by counsel, and, it appearing to the satisfaction of the court, that James M. Deadman and Henry Hall had been duly summoned to appear at this term of the court, and testify in behalf of the State in this cause, and who, being called, came not, but made default: It is therefore considered by the court, that the State of Alabama, for the use of Lowndes County, recover of each of said defaulting witnesses the sum of one hundred dollars, unless they appear at the next term of the circuit court to be holden for this county, and show good and sufficient cause why they made default; and let a scire facias issue to each of said defaulting witnesses. And the defendant, Antonio Aicardi, being charged upon the bill of indictment, with the offense of keeping a gaming-table, plead not guilty thereto, and thereupon came to jury, to wit:

E. L. James, and eleven others, good and lawful men, who, being empanneled and sworn well and truly to try and a true deliverance make between The People of the State of Alabama and the prisoner at the bar, upon their oaths, do say, they find the defendant guilty, as
15 charged in the indictment, and impose as a fine the sum of five hundred dollars.

It is therefore considered by the court that the State of Alabama, for the use of Lowndes County, recover of the defendant the fine so assessed against him by the jury aforesaid, together with the costs in this behalf expended; but, because the defendant has reserved questions of law in the progress of the trial, for the purpose of having this case revised by the supreme court, and the defendant having given bond, with good security, for his appearance at the next term of this court, to abide such judgment as may be then rendered in this cause, the execution of this judgment is superseded until the next term of this court.

Appeal bond.

THE STATE
vs.
ANTONIO AICARDI.

Came the State, by its solicitor, and also the defendant in person, and, in the trial of this cause, certain points having been reserved for revision by the supreme court, the defendant, Antonio Aicardi, with Eugene Beebe, and Thomas W. Armstrong, as his sureties, came forward and agree to pay the State of Alabama, for the use of Lowndes County, the sum of one thousand dollars, if the said defendant fail to appear at the next term of this court, and abide the judgment taken to be rendered in this cause.

Bill of exceptions.

THE STATE OF ALABAMA,
Lowndes County:

Spring term, 1872.

THE STATE OF ALABAMA
vs.
ANTONIO AICARDI.

Indictment for keeping & exhibiting a gaming-table.

On the trial of this cause the State introduced evidence tending to prove that, within twelve months before the finding of this indictment, in the city of Selma, in the County of Dallas, in said State, the defendant did keep, exhibit, and was interested in keeping and exhibiting a table similar in many respects to a table commonly known and called a roulette table, or table and wheel similar to a roulette table, at which money was bet by persons operating at said table; that the money was bet in this manner, viz: The person who wished to bet on said table, would pass to the game-keeper money, for which he would receive in return checks of bone or ivory, of the same kind used in betting at the game of faro; that then the checks would represent and stand for money, and when handed in to the game-keeper by the player, would be re-

deemed in money at the value at which they were passed out by the game-keeper; that the betting was carried on in this wise: A large table was placed or kept in front of the game-keeper, upon which was a piece of oil-cloth, upon which was painted or printed certain numbers, from one to thirty-one, also columns in which said numbers were painted or printed, said *numbers* [columns] were in alternate colors of black and red below the green column hereafter described.
17 On this table was a wheel, the same as used in the game
known as roulette. On this wheel were painted colors and numbers exactly corresponding with the numbers and colors on the oil-cloth. A ball or marble was placed in this wheel, and the wheel was started by the game-keeper to revolve on its pivot, and the ball or marble was started at the same time. The bet was determined when the wheel stopped, and the ball falls into some one of the numbers, and in one of the columns of the red or black. If the ball falls on a color bet on, the player wins; if not, the game-keeper wins. If the ball falls on a single number bet on, the player wins 27 for one bet, or in the checks used as a substitute for money. There is above these columns of red and black a green-colored column, in which are painted the numbers 31, 30, & 29. The other numbers are in the red and black. The only difference between this wheel and a roulette wheel is that on the roulette wheel instead of No. 31 there is an O in place of 30, a picture of an eagle bird, and in place of number 29 is OO. That in this manner persons were betting at said table in the city of Selma, and won and lost money at the same, within twelve months before the finding of this indictment.

The defendant proved that, in the exhibition and carrying on said table and business, proved by the State, he was acting as the agent and partner of I. C. Moses & Co., and in no other way; that the game or lottery was exhibited openly and persons publicly invited to par-
18 ticipate therein; that it was announced on & in the building in
which this business was carried on that it was done under the authority of an act of the legislature of Alabama, passed and approved the 31st of December, 1868, entitled "An act to establish the Mobile Charitable Association, for the benefit of the common-school fund of Mobile County, without distinction of color," found on page' 511 & 512 of the pamphlet acts of 1868. This act was read in evidence. It was further, by the State, admitted as facts that the said I. C. Moses & Co., on the 2d day of February, 1869, paid to the board of school commissioners of Mobile County, the sum of one thousand dollars, under and in pursuance of said act of the general assembly of Alabama; that, a short time before, February 2d, 1870, the said I. C. Moses & Co. paid another sum of one thousand dollars to said board of school commissioners, under and in pursuance of said act of the general assembly; and that, in the forepart of the year 1871, the said I. C. Moses & Co. paid another sum of one thousand dollars to said board of school commissioners, under and in pursuance of said act of the general assembly; that, on the 30th of January, 1872, the said I. C. Moses & Co. paid to said board of school commissioners another sum of one thousand dollars, under and in pursuance of said act of the general assembly. It was further proven that the acts of the defendant, Aicardi, in exhibiting said table on which the State sought a conviction, were directed
19 & controlled by the said I. C. Moses & Co., and that the mode of
distributing awards & prizes, as before stated, under the said act of the general assembly had been prescribed to the defendant, Aicardi, by said I. C. Moses & Co., and that said Aicardi was their agent and

partner in carrying on said business in the city of Selma; and that the acts proven by the State were done by said Aicardi under the rules and regulations prescribed by said I. C. Moses & Co., and claimed to be in pursuance of the act of the general assembly before named, and not otherwise. It was also proven that the establishment of the defendant, at which his said business was carried on, was called the Mobile Charitable Association 31-Ball Lottery, and that certificates of subscription were given to the persons who operated or bet at said table, and that these certificates of subscription were exchanged with the keeper of the table for the checks described in the foregoing evidence before the persons who had subscribed and obtained said certificates of subscription procured the said checks and commenced their operations or betting. It was further proved that this exchange of certificates of subscription was at the option or request of the person or persons who held such certificates, and that if the persons holding such certificates did not request checks, they had the privileg' of putting the certificates themselves down on any column or number, so as to determine their chances
for procuring awards & prizes, and that this mode of determining
20 and distributing awards & prizes was selected by said I. C.
Moses & Co., and followed by defendant, under their direction.
The defendant proposed to prove that he, after the passage of the act of the 18th of March, 1871, repealing the act of December 31, 1868, consulted his attorneys, Samuel F. Rice and John A. Elmore, as to the effect of the said repealing act of 18th of March, 1871, and whether it was not unconstitutional, and whether it did legally repeal the act of 31st Dec., 1868, and whether said I. C. Moses & Co. could legally carry on their business under the said act of Dec. 31, 1868, notwithstanding the said act of March 18, 1871, and that said attorneys advised the said I. C. Moses & Co. and the defendant that the said act of March 18, 1871, was unconstitutional and void, and did not legally repeal the act of 31st of Dec., 1868, and that the playing or betting testified to by the witnesses for the State was done after such advice to said I. C. Moses & Co. & defendant. The State objected to this evidence, and the court sustained said objection, and refused to permit the defendant to make such proof or any part thereof; and to this action of the court the defendant excepted.

The foregoing was all the evidence in the cause, and on this evidence the court charged the jury, amongst other things, "That if the table
exhibited by the defendant as shown in the proof was a table
21 commonly used as a gaming-table of any kind—you need not give
it a name—it is sufficient to authorize a conviction in this case.
To this the defendant excepted.

The court gave the following charge, marked Exhibit A, and hereto attached: If you find from the evidence that the defendant, Antonio Aicaidi, in the county of Dallas, at the time specified in the indictment, kept, exhibited, or was interested or concerned in keeping or exhibiting any table for gaming, of whatever name, kind, or description, not regularly licensed under the laws of this State, then you may find the defendant guilty, and may assess a fine not less than one hundred nor more than one thousand dollars. To this charge the defendant excepted.

The defendant asked the court to give the following written charges, numbered 1, 2, 3, 4, & 5, hereto attached as Exhibits B, C, D, E, F.

1st.—Exhibit B.

If the jury believe all the evidence, and if, from the evidence, they are satisfied and convinced that the defendant, in all that is proved he has done, acted in good faith and honestly, and verily believed he was doing what the State, by the said act of Dec. 31, 1868, to establish the Mobile Charitable Association, read in evidence, clearly authorized him to do, then, upon this state of facts, the jury ought not to find the defendant guilty.

Exhibit C.

22 The defendant cannot be found guilty under the indictment in this case if the jury are convinced by the evidence that he had no criminal intent, no intent to violate any penal or other law of the State; and if the defendant, in all that he did, acted in good faith and under an honest belief that he was doing what the said act of Dec. 31, 1868, to establish the Mobile Charitable Association, clearly authorized him to do.

Exhibit D

If the said I. C. Moses & Co., mentioned in the act of the legislature of December 31, 1868, to establish the Mobile Charitable Association, read in evidence on the 2d day of February, 1869, paid to the secretary of the board of school commissioners of Mobile County, one thousand dollars, under and in pursuance of said act of the legislature, and as an acceptance by them of the terms and provisions of said act of the legislature; if said board ratified and approved said payment, and had the benefit thereof for the use of the common school of Mobile County, then such acceptance and payment and ratification gave to said act of the legislature the effect and force of a valid and binding contract; and, if all the evidence is believed by the jury, no act of the legislature, passed after such acceptance and payment, purporting to repeal said first above-mentioned act, is constitutional or valid, but is void and of no force.

23 4th. That if I. C. Moses & Co., under the act of the legislature of the 31st of December, 1868, paid to the board of school commissioners of Mobile County one thousand dollars, on the 2d day of February, 1869, and also paid said board before February, 1870, another thousand dollars, and on the 19th of April, 1871, paid said board another thousand dollars—all said payments being made by virtue of the provisions of said act; and if the said I. C. Moses & Co., in good faith, adopted the mode described by the witnesses as the mode by which prizes should be awarded to the purchasers of certificates, and such mode of awarding prizes was by lot or chance, and the defendant was a partner and agent of I. C. Moses & Co., carrying on said business as aforesaid, in good faith, and this indictment is for so carrying on said business, then the defendant cannot be convicted.

Exhibit F.

5th. That, under the act of the legislature passed on the 31st of December, 1868, and found on pages 511 & 512 of the acts of 1868–9, the parties named therein, I. C. Moses & Co., their associates and agents, after paying the money therein required to be paid by them, were

authorized to carry on their busines at any place or places within this
State, and that the award of prizes therein named could be legally dis-
tributed by casting of lots, by lot, chance, or otherwise in such
24 manner as they, the said I. C. Moses & Co., might think proper
and best to promote the interest of the school fund of Mobile
County, and that under said act the said I. C. Moses & Co. were not
confined to a lottery in their distribution of prizes to be awarded, in
said act of the legislature.

Each one of these charges was asked to be given separately, and the court refused to give each one of them; & the defendant excepted to the refusal to give each one as asked, & this is signed and sealed as a bill of exceptions in term time by the presiding judge, May 11, 1872.

JAMES Q. SMITH. [SEAL.]

The above is right.

R. M. WILLIAMSON.

Clerk's circuit court certificate.

THE STATE OF ALABAMA,
Lowndes County:

I, W. H. Hunter, clerk of the circuit court of the county aforesaid, do hereby certify that the foregoing pages, from one to twenty-nine, inclusive, contain a full and complete transcript of the record and proceedings of the said circuit court in a cause therein pending, wherein the State of Alabama was plaintiff, and Antonio Aicardi defendant. I further certify that said Antonio Aicardi did, on the 11th day of May, 1871, pray an appeal to the next term of the supreme court of Alabama, which appeal was granted upon his entering into the recognizance fully set forth on page 18 of this transcript.

25 In witness whereof I have hereunto set my hand and affixed the seal of said court at office this the 19th day of June, 1872.

W. H. HUNTER,
Circuit Clerk.

Filing.

Received and filed in office 20th June, A. D. 1872.

D. B. BOOTH,
Clerk Supreme Court, State Alabama

Submission.

Supreme court of Alabama, June term, 1872.

ANTONIO AICARDI, APPELLANT,
vs.
THE STATE OF ALABAMA, APPELLEE.

Appeal from the circuit court of the county of Lowndes.

JUNE 20th, 1872.—Argued by counsel and submitted for decision.

D. B. BOOTH.
Clerk Supreme Court, State Alabama.

Opinion supreme court.

Opinion of supreme court of the State of Alabama.

ANTONIO AICARDI, APPELLANT,
vs.
THE STATE OF ALABAMA, APPELLEE.

B. F. SAFFOLD, *J*:—

The appeal is from a conviction of the appellant under an indictment for keeping a gaming-table, contrary to Revised Code, s. 3621.

The matters in issue are the same as those considered in Aicardi vs.
The State, 2 Div., No. 101, from Dallas circuit court, except as
26 is hereinafter stated:

The defendant sought to justify his keeping a roulette table under the act of Dec. 31, 1868, "To establish the Mobile Charitable Association," &c. He was an agent of that association, and he believed that the act above mentioned authorized the keeping of a gaming-table and was a contract between the associates and the State which was irrepealable. He proposed to prove that he had consulted with able lawyers, competent to advise him about the validity of the act of March 18, 1871, repealing the said act of 1868, and that, in pursuance of their counsel against its validity, he had, after such repeal, kept a table similar in its gaming characteristics to roulette, in good faith, and without intention of violating the law. The court refused to admit the evidence. There was no error in this, because it was a mere mistake of law.

On the authority of Harsh, Mayor &c., vs. Moses & Co., and Aicardi vs. The State, at the present term, on the other points the judgment is affirmed.

Filing.

JULY 17, 1872.—Opinion filed in office.

D. B BOOTH,
Clerk Supreme Court of Alabama.

Judgment of supreme court.

Supreme court, June term, 1872. July 17, 1872.

ANTONIO AICARDI
vs.
THE STATE OF ALABAMA.

Comes the appellant, by attorney; also comes the attorney-general,
who appears on behalf of the State, and, the record and the mat-
27 ters therein assigned as error being argued & submitted, on the
briefs of the counsel for the parties, and duly examined and understood, it seems to the court that, in the record and proceedings of said circuit court, there is no error.

It is therefore considered by the court that the judgment of said circuit court be in all things affirmed. It is further considered by the court that said appellant pay the costs accruing on said appeal in this court, and in said circuit court.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Alabama, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between the State of Alabama, plaintiff, and Antonio Aicardi, defendant, in the circuit court of Lowndes County, Alabama, and the said Antonio Aicardi, appellant, and the State of Alabama, appellee, in the supreme court of the State of Alabama, wherein was drawn in question the validity of a treaty or a statute of, or an authority exercised under, the United States, and the question was against their validity; 28 or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error has happened, to the great damage of the said Antonio Aicardi, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so as to have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to 29 the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of said Supreme Court, this the 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

NATHANIEL W. TRIMBLE,
Clerk of the Circuit Court of the United States
for the District of Alabama.

Refusal of chief justice to allow writ of error.

MONTGOMERY, *July* 27, 1872.

I hereby refuse to grant this writ of error.

E. W. BECK,
Chief Justice Sup. C't, Alabama.

Allowance by Associate Justice Bradley of the Sup. C't U. S.

Allowed, October 17, 1872, by

JOSEPH P. BRADLEY,
Associate Justice Supreme Court U. S.

Filing.

Lodged and filed in office clerk supreme court of Alabama, October 22, 1872.

D. B. BOOTH,
Clerk Sup. C't of Alabama.

Writ of error bond.

Know all men by these presents that we, Antonio Aicardi, Eugene Beebe, and Ferrie Henshaw, are held and firmly bound unto the State of Alabama in the full and just sum of two thousand dollars, to be paid to the said State of Alabama, their certain attorney, executors, and administrators, jointly and severally, by these presents, sealed
30 with our seals, and dated this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately, at a regular term of the supreme court of the State of Alabama, regularly begun and held on the 1st Monday in June, A. D. 1872, in a suit depending in said court, between the said Antonio Aicardi and the said State of Alabama, judgment was rendered against the said Antonio Aicardi; and the said Antonio Aicardi having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Alabama, citing and admonishing the said State to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Antonio Aicardi shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

A. AICARDI & JONES. [L. S.]
EUGENE BEEBE. [L. S.]
FERRIE HENSHAW. [L. S.]

Sealed & delivered in presence of—
JAMES Y. BRAME.
A. MCINTRYE.

Approval.

Approved, October 17, 1872, by—

JOSEPH P. BRADLEY,
Associate Justice Supreme Court U. S.

Filing.

Filed, October 22, A. D. 1872.

D. B. BOOTH,
Clerk Sup. C't Al'a.

31 *Citation.*

The United States of America to the State of Alabama, or its attorney-general, John W. A. Sanford, esq., attorney of record for said State, in the cause herein below mentioned, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first

Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, wherein Antonio Aicardi is plaintiff and you ar' defendant in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 17th day of October, A. D. 1872.

JOSEPH P. BRADLEY,
Associate Justice Sup. C't U. S.

32 Supreme court, State of Alabama.

I, D. B. Booth, clerk of the supreme court in and for the State of Alabama, do hereby certify that the within and foregoing pages, numbered from one (1) to thirty-one, (31,) both inclusive, contain a true and correct, full and complete, transcript of the record and proceedings had in said supreme court of Alabama, in a cause therein lately pending, wherein Antonio Aicardi was appellant and the State of Alabama was appellee, as fully and completely as the same now appears of record and on file in my office, together with a true and correct, full and complete, copy of the writ of error and writ of error bond, allowed in the aforesaid mentioned suit.

I further certify that said appellant, said Antonio Aicardi, did make application to honorable E. Wolsey Peck, chief justice of said supreme court of Alabama, as aforesaid, for a writ of error, to revise and reverse the judgment and decree rendered by said supreme court of Alabama, in the aforesaid mentioned suit, at its June term, A. D. 1872; and that said honorable E. Wolsey Peck, chief justice of said supreme court of Alabama, as aforesaid, did, on the 27th day of July, A. D. 1872, refuse to allow said appellant, said Antonio Aicardi, said writ of error; and that afterwards, to wit, on the 17th day of October, A. D. 1872, said writ of error and a writ of error bond were allowed said appellant, said
33 Antonio Aicardi, by honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, as fully appears from said original writs hereto attached to this transcript.

In witness whereof I have hereunto set my hand and affixed the official seal of said supreme court of Alabama this the 2d day of November, in the year of our Lord one thousand eight hundred and seventy-two, (A. D. 1872.)

[SEAL.] D. B. BOOTH,
Clerk Supreme Court of the State of Alabama.

[Stamp, tax on seal, two dollars, affixed and cancelled.]

34 Know all men by these presents that we, Antonio Aicardi, Eugene Beebe, & Ferrie Henshaw, are held and firmly bound unto the State of Alabama in the full and just sum of two thousand dollars, to be paid to the said State of Alabama, their certain attorney, executors, & administrators, jointly and severally, by these presents, sealed with our seals, and dated this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately at a regular term of the supreme court of the State of Alabama, regularly begun and held on the 1st Monday in June, A. D.

1872, in a suit depending in said court between the said Antonio Aicardo and the said State of Alabama, judgment was rendered 35 against the said Antonio Aicardi, and the said Antonio Aicardi having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Alabama, citing and admonishing the said State to be and appear at a Supreme court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Antonio Aicardi shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

36 A. AICARDI & JONES. [L. S.]
EUGENE BEEBE. [L. S.]
FERRIE HENSHAW. [L. S.]

Sealed and delivered in presence of—

Witness as to signature of Aicardi:
J. H. KLING.
Witness to others:
JAMES W. BRAME.

Approved by
The above bond is approved. October 17, 1872.
JOSEPH P. BRADLEY,
Asso. Just. Sup. C't U. S.

(Indorsed:) The State of Ala. vs. Antonio Aicardi. Writ of error bond. Filed Oct. 22, '72. D. B. Booth, clerk supreme court Ala.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Alabama, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Alabama, plaintiff, and Antonio Aicardi, defendant, in the circuit court of Dallas County, Alabama, and the said Antonio Aicardi, appellant, and the State of Alabama, appellee, in the supreme court of the State of Alabama, 38 wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifold error

39 hath happened, to the great damage of the said Antonio Aicardi, as by his complaint appears: We *are* willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the
40 said Supreme Court, this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] NATHANIEL W. TRIMBLE,
Clerk of the Circuit Court of the United States
for the Dist. of Alabama.

Allowed October 17th, 1872, by
JOSEPH P. BRADLEY,
Associate Justice Sup. C't U. S.

MONTGOMERY, *July* 27, 1872.

I hereby refuse to grant this writ of error.
E. W. PECK,
C. J. Sup. Court of Ala.

(Indorsed:) Antonio Aicardi vs. The State of Ala. Writ of error. Filed Oct. 22, '72. B. Booth, cl'k supreme court Ala.

41 The United States of America to the State of Alabama, or its attorney-general, John W. A. Sanford, esq'r', attorney of record for said State in the cause herein below mentioned, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, wherein Antonio Aicardi is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the
42 Supreme Court of the United States, this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

JOSEPH P. BRADLEY,
Associate Just. Sup. C't U. S.

43 Rec'd in office Nov. 2, 1872.

R. W. HEALY,
U. S. Marshal So. & Mid. Dist's of Al'a.

Executed by serving a copy of the within citation on the Hon. Jno. W. A. Sanford, attorney-general of the State of Alabama, this 4th day of November, 1872.

R. W. HEALY,
U. S. Marshal.
By J. V. MILLIFORD,
Sp. Deputy.

Service, $2.00.

(Indorsed:) Second div., No. 101. The State of Ala. vs. Antonio Aicardi. Citation. Filed Oct. 22, '72. D. B. Booth, clerk supreme court Ala. Original.

(Indorsement on cover:) No. 306. Antonio Aicardi, plaintiff in error vs. The State of Alabama. Alabama sup. c't. Filed 2d December, 1872.